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U.S.Department of Labor
Mine Safety and Health Administration
Coal Mine Safety and Health, and
Metal and Nonmetal Mine Safety and Health
March 1989

Handbook Number 89-I-I

SPECIAL INVESTIGATIONS

PROCEDURES

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PREFACE

This handbook sets forth guidelines and instructions for conducting special investigations pursuant to Title 1 of the Federal Mine Safety and Health Act of 1977. The guidelines and instructions in this handbook are primarily procedural and administrative, and are intended to serve only as organizational and technical aids for all MSHA's enforcement personnel. Previously issued material on this subject matter is superceded by this handbook.

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INTRODUCTION

Authority

Section 103(a) of the Federal Mine Safety and Health Act of 1977, Public Law 91-173, as amended by Public Law 95-164, requires that authorized representatives of the Secretary of Labor have the right of entry to, upon, or through any mine to inspect and investigate for the purpose of determining whether there is compliance with mandatory standards or any other requirement of the Act.

Purpose

This handbook has been developed to provide guidance for the investigation of discrimination complaints and special investigations pursuant to Section 110 of the Federal Mine Safety and Health Act of 1977.

Responsibility

Section 5 of the Secretary's Order 3-78, dated March 16, 1978, delegated to the Assistant Secretary of Labor for Mine Safety and Health, authority for the responsibility of administration and enforcement of the Department's mine safety and health programs under the Federal Mine Safety and Health Act of 1977, except Title IV of the Act, with the exception of legal authorities thereunder which are delegated to the Solicitor of Labor.

CHAPTER I - GENERAL INFORMATION

A. CREDENTIALS

Special investigator credentials will be requested by submitting a memorandum to the appropriate headquarters special investigations office. The Administrator shall review the request for credentials to determine if the person has completed the required Agency training, prior to submission to the Assistant Secretary for issuance of the credentials.

Special investigator credentials will be kept in the possession of the person to whom issued and will not be loaned to others. Credentials also will not be used to obtain preferential treatment on personal matters. Improper use or failure to safeguard credentials may result in disciplinary action.

If an employee loses his/her credentials, or if they are stolen, the employee shall notify the supervisory special investigator immediately. Every effort should be made to recover lost credentials, including a thorough search of the locations where the loss may have occurred. If the credentials are not recovered within 24 hours after they are discovered to be missing, the supervisory special investigator or District Manager will immediately notify the local FBI office and police of the loss or theft by written communication. The employee will prepare a memorandum explaining in detail the circumstances surrounding the loss or theft of the credentials. The memorandum will be forwarded through appropriate channels to the special investigations headquarters office. The same procedures described above will also be followed if the missing credentials are later recovered.

The supervisory special investigator shall be responsible for obtaining investigators credentials when the investigator separates from MSHA or when the investigator is reassigned to another position within the Agency. The supervisory special investigator shall forward the credentials to the special investigations headquarters office, by certified mail, for cancellation.

When conducting interviews the investigators must introduce themselves, display their credentials, and advise the interviewee that they are conducting an investigation for MSHA. This identification shall precede any request for information. When conducting other investigative business, the investigator will use discretion and judgment concerning the display of credentials.

B. EQUIPMENT AND FACILITIES

Each District Special Investigations unit must maintain appropriate equipment and facilities so that each special investigator may properly conduct special investigation activities. As a minimum, each District Special Investigations unit shall maintain:

Private facilities, for conducting interviews, report writing, review of tape recordings, etc.
Locked file cabinet or safe
Access to private telephone lines
*Appropriate transportation
Photographic equipment:
- Camera, 35 mm
- Camera, self-developing
- Film and appropriate accessories

Cassette recorder and appropriate transcribing accessories
Miscellaneous:
- Measuring tape
- Master log (bound with numbered pages)
- Etching tool or other permanent marking device
- Evidence tags
- Forms necessary for collection and preservation of evidence
- Padlocks

*The Agency recognizes that appropriate transportation may mean an unmarked vehicle. The Headquarters office shall be involved when a decision to use an unmarked vehicle is made.

C. CONFIDENTIALITY AND MEDIA INQUIRIES

All special investigations are confidential and shall not be discussed with any unauthorized persons. Any requests for information on a particular case shall be referred to the appropriate special investigations headquarters office.

The Criminal Division of the Department of Justice will review the proposed response to media inquiries in referred cases or matters where their involvement appears probable. Responsibility for clearance with the Criminal Division of Justice has been assigned to the Office of the Solicitor. Any such inquiries shall be promptly referred to the headquarters special investigations office for review and then forwarded to the Associate Solicitor's Office for clearance with the Criminal Division of Justice.

If the Department of Justice proceeds with prosecutorial action, the investigation may progress to the point that the case is presented to a Grand Jury. If this occurs, the Department of Justice will restrict any discussion or release of materials without their prior approval.

D. **INVESTIGATOR'S RESPONSIBILITIES**

1. **General:** The special investigator's responsibilities include, but are not limited to, the following:

   Initiating a M/NM Inspection/Investigation Data Summary (Form 4000-40) or a CMS&H Mine Activity Data (Form 2000 -122);

   Interviewing persons and taking written or oral statements concerning an alleged violation of the Act (see Chapter V);

   Establishing jurisdiction (see Chapter IV);

   Reviewing pertinent records, documents, or files which may have a bearing on the case;

   Evaluating the testimony and evidence gathered;

   Writing the final investigative report detailing the facts of the case, analyzing the merits and recommending appropriate action (see Chapter VII); and,

   Notifying the supervisory special investigator of any allegations of possible criminal activity not covered by the Mine Act, e.g., stolen explosives, drug trafficking allegations, etc. The supervisory special investigator will discuss the situation with the District Manager and contact the National Office or other Federal agency where appropriate.

2. **Investigative Assistance:** The supervisory special investigator should be contacted if it is determined that assistance is required from another investigator at a distant location not within the normal geographical area of the investigator assigned to the case. The supervisory special investigator will be responsible for arranging for the assistance of an additional investigator.

E. SOURCES OF INFORMATION

1. **General:** Expeditious and logical investigations generally involve the use of one or more of the following investigative aids: personal interviews, record/document checks, personal observations, newspaper articles, and confidential sources (informants).

2. **Examination of Records and Documents:** During the course of most investigations, it becomes necessary to examine certain records and public documents. Official and unofficial records are a source of essential information pertinent to practically all investigations. Many types of records may be obtained from the Department and other Federal and State agencies. The investigator should become familiar with where to locate and how to obtain official copies of public documents, and have some knowledge of the information that is available at courthouses, registries of deeds and similar institutions. Most importantly, the investigator should be familiar with all of the records, documents and reports required to be kept and/or maintained by the Act, and where these may be found.

   It is important to determine what records are needed or what documents are necessary. Know what to look for, and have some idea of where the information may be found. The supervisory special investigator will be available to assist in this effort. Certain investigations require the hand-copying of data from original records. Detailed planning is necessary before undertaking this task. Be sure that the information is significant and necessary to the investigation.

3. **Surveillance:** In general, surveillance means keeping a close watch over a person, group or operation. A technical surveillance is the utilization of electronic or mechanical (bugging) devices for the purposes of secretly intercepting or recording conversations. A physical surveillance is the maintenance of a close and constant personal observation. Technical surveillance will not be utilized in the course of MSHA investigations, except with the expressed authorization and approval of the Department of Justice or Assistant Secretary for Mine Safety and Health in conjunction with the Office of the Solicitor.

F. **CONTACTS WITH LAW ENFORCEMENT AGENCIES AND PROSECUTORIAL AUTHORITIES**

1. **Liaison:** District Managers will promote and ensure close working relationships between supervisory and other special investigators and officials (prosecuting attorneys, U.S. Marshals, etc.) in local, Federal and State law enforcement agencies. Likewise, designated headquarters personnel will maintain the necessary contacts with Federal law enforcement agencies. Supervisory Special Investigator and National Headquarters staff will promote and ensure coordination with the Office of the Solicitor.

2. **Requests for Information or Services:** Listed below are the procedures to be followed in those rare instances when information or services are requested from the various FBI offices. The following procedures can be initiated with approval from the District Manager.

   a. FBI Field Offices and Laboratory

      Requests for name checks concerning information in FBI files may be made directly to the FBI field offices. The FBI will provide such data except in those instances where the subject of the request is involved with a pending FBI investigation. The purpose of the name check request should be indicated.

      When requesting laboratory examination of evidence, guidance on the packing and transmittal of evidence will be provided by the FBI field office.

   b. FBI Headquarters

      Written requests for identification (fingerprint records) checks must be directed to the FBI headquarters office. The purpose for the request must be given.

CHAPTER II - DISCRIMINATION COMPLAINTS

A. INTRODUCTION

The intent of Congress as expressed in part by Senate Conference Report, No. 95-181, was that in order to have a truly effective national mine safety and health program, miners will have to play an active part in the enforcement of the Act. To do this, miners must be encouraged to be active in safety and health matters and protected against any possible discrimination which they might suffer as a result of their participation. Section 105(c) of the Act prohibits such discrimination.

In addition, Section 428 (Title IV) of the Act prohibits discrimination against coal miners (not applicants for employment) who are suffering from pneumoconiosis. That Section is administered by the Employment Standards Administration (ESA) of the United States Department of Labor. Section 428 states:

> (a) No operator shall discharge or in any other way discriminate against any minor employed by him by reason of the fact that such miner is suffering from pneumoconiosis. No person shall cause or attempt to cause an operator to violate this section. For the purposes of subsection the term 'miner' shall not include any person who has been found to be totally disabled.

The following may be of assistance in readily identifying some of the more common examples of protected activities and discriminatory acts. Discrimination on the basis of race, sex, age, religion, handicap, etc., is not covered by Section 105(c) of the Act. Efforts should be made to assist the complainant in contacting other agencies for the appropriate relief.

PROTECTED ACTIVITIES INCLUDE, BUT ARE NOT LIMITED TO

Filing or making a complaint of an alleged danger or safety or health violation.

Instituting any proceeding under this Act (for example, filing a complaint with the Federal Mine Safety and Health Review Commission pursuant to Section 111).

Being the subject of medical evaluation and potential transfer under Section 101 (harmful physical agents and toxic substances).

Enforcement of the safety training provisions of Section 104(g) and Section 115.

Refusal to work in unsafe or unhealthy conditions.

Exercising any statutory rights afforded by this Act.

DISCRIMINATORY ACTS INCLUDE, BUT ARE NOT LIMITED TO:

Discharge

Termination

Laying off

Demotion

Refusal of employment

Reduction in benefits, vacation, bonuses, or rates of pay

Changes in pay and hours of work

Subtle forms of interference, such as promises of benefit or threats of reprisal

Interference with the exercise of the statutory rights of miners

Transfer to another position with compensation at less than the regular rate of pay received immediately prior to transfer.

1. **Agreement With Employment Standards Administration:** MSHA and the Employment Standards Administration (ESA), U.S. Department of Labor, entered into a memorandum of understanding in order to provide additional receiving points for discrimination complaints filed under Sections 105(c) and 428 of the Act. Essentially, the ESA complaint processors, located in the various ESA Black Lung Offices, have also been delegated the responsibility of receiving Section 105(c) and Section 428 discrimination complaints.

   The MSHA special investigation headquarters offices and the ESA Office of Workers' Compensation Programs, will be responsible for coordination and consultation in the handling of the discrimination complaints covered by this agreement.

   Part 90 is the only program which provides for a right of transfer based on medical evaluation, pursuant to Section 105(c)(1), for which only underground coal miners are eligible.

Surface miners and surface applicants for employment may not be entitled to any remedy under Section 105(c), although in some instances may appropriately file a claim pursuant to Section 428. Therefore, a comprehensive investigation shall be completed in any alleged Black-Lung-related case.

2. **Agreement With National Labor Relations Board:** MSHA and the National Labor Relations Board (NLRB) entered into a memorandum of understanding for coordinating complaints which may occur alleging violations of both the Mine Act and the National Labor Relations Act.

   The special investigations headquarters offices and the National Labor Relations Board, Division of Operations Management, will be responsible for coordination and consultation in the handling of discrimination complaints covered by this memorandum of understanding.

B. **PROCESSING DISCRIMINATION COMPLAINTS (GENERAL):**

This chapter outlines the procedures to be used by MSHA in processing complaints. The proper coordination and processing of inquiries and complaints will ensure efficient action on the part of MSHA personnel, both investigators and complaint processors. A discrimination complaint filed under Section 105(c) may be filed with any District, Subdistrict, Field, Headquarters office, or any ESA Black Lung Office. At least one person (the complaint processor or another person so designated) in each MSHA District, Subdistrict or Field office must be designated and trained to handle inquiries and process the complaints which are filed. At least one alternate should be appointed in the event the complaint processor is unavailable.

Confidentiality must be maintained by all MSHA employees involved in the Section 105(c) process. In accordance with MSHA Privacy Act record-keeping procedures published in the Federal Register, no copies of the discrimination complaints are to be retained by the complaint processor. Only the original is to be maintained in the case file.

1. **Receiving Complaints:** Complaint Forms 2000-123 and -124 (Exhibits 2-1 and 2-2) may be obtained from any MSHA Office or ESA Black Lung Office. Instructions for completion of Forms 2000-123 and -124 are included in Exhibit 2-3.

If a miner, representative of miners, or applicant for employment wishes to file a complaint on behalf of numerous persons, every attempt should be made to encourage the filing of a separate complaint by each individual complainant. Because of the complexity and uncertainty of the Procedural rules which would govern "class action" filings, the filing of individual complaints guarantees each complainant that his/her complaint will be investigated.

a. In Person: Individuals who come into an MSHA office with questions concerning an alleged discriminatory action shall be referred to the complaint processor or other designated person. The complaint processor should discuss the general nature of the complaint with the individual(s) and provide assistance with the following items:

--Complaint Forms 2000-123 and -124 (Exhibits 2-1 and 2-2)

--Federal Mine Safety and Health Review Commission Rules of Procedure (Exhibit 2-4)

--Privacy Act Statement (Exhibit 2-5).

If the complainant(s) indicate that the alleged discriminatory action resulted in a loss of wages, the complaint processor should also provide them with the following items:

--Information on Backpay for Miners (Exhibit 2-6)

--Claimant Expense and Search for Work Report (Exhibit 2-7)

b. By Telephone: Individuals who make inquiries by telephone shall be referred to the complaint processor. The complainant(s) shall be advised that they may come into any MSHA office and will be assisted in preparing and filing a discrimination complaint. In those instances where a person cannot come to an MSHA office, a cover letter should be prepared (Exhibit 2-8), enclosing each of the Exhibits listed under Item No. 1 (In Person:), and transmitted via certified mail--return receipt requested.

c. By Mail: A letter or written document received in any MSHA office, regardless of its form, which alleges a discriminatory act, will be treated as a complaint filed with the Secretary under Section 105(c). The information submitted will be transferred by the complaint processor

to the official MSHA Complaint Forms 2000-123 and -124 and attached to the complainant's letter. The date the complaint is received should be inserted in the appropriate block on Form 2000-123.

If additional information is not available for completing the required forms, the complaint processor should contact the complainant by telephone or mail.

2. Assigning Case Numbers and Investigators: Upon receipt of a written discrimination complaint, the complaint processor shall obtain a case number from the supervisory special investigator (CMS&H) or Arlington Headquarters (M/NM) and the name of the investigator assigned to the case from the supervisory special investigator. The complaint processor should then initiate the Investigation Assignment Control Form (Exhibit 7-3) which will be placed in the case file and distribute the copies as indicated on the Control Form. (Instructions for completion are included in Exhibit 7-4). The Headquarters copy of the Assignment Control Form should have a copy of the MSHA Forms 2000-123 and -124 attached. A documentation log (i.e.: Exhibit 2-14) shall be established and maintained by the supervisory special investigator for all cases filed.

When a discrimination complaint is filed in an "out of District jurisdiction" area, the supervisory special investigator should be immediately notified by the complaint processor, before a case number is assigned.

3. Notification Letters: Once the special investigator has been assigned, the appropriate notification letters will be prepared and distributed to the complainant(s) and respondent(s).

The complainant(s) notification letter (Exhibit 2-9) should include as enclosures the completed Complaint Forms 2000-123 and -124 (Exhibits 2-1 and 2-2).

The respondent(s) notification letter (Exhibit 2-10) should include as enclosures only the completed Complaint Form 2000 -124 (Exhibit 2-2) and the Federal Mine Safety and Health Review Commission Rules of Procedure (Exhibit 2-4).

Each complainant and each respondent listed on the Complaint Form (2000-123) must be sent a separate notification letter and appropriate enclosures by certified mail-return receipt requested, or hand-delivered and documented on the copy of the letter maintained in the investigative file, for proof of service purposes. If the certified mail documents are not

delivered to the addressee, but are returned as undelivered or unclaimed, the supervisory special investigator shall be notified immediately by the complaint processor.

4. General Investigative Procedures: Section 105(c) requires that the investigation commence within 15 calendar days of receipt of a complaint. If a discrimination complaint alleges a discharge, the special investigator assigned the case will begin the investigation as quickly as possible. In all cases, MSHA policy requires that within 45 calendar days of receipt of the complaint, the investigation will be completed and a final report submitted to Headquarters. The final report will be considered timely if postmarked within 45 days. In those instances where a Section 105(c) investigation will not be completed within the 45-day time limit, a written request for extension of time and justification may be submitted by the supervisory special investigator through the District Manager to the special investigations headquarters office.

5. Withdrawn Complaints: If at any time during the investigation, the complainant(s) wish to withdraw the complaint(s), this request should be reduced to writing and signed by the complainant(s). Preferably, Exhibit 2-11 should be completed by the complainant(s) and witnessed by the special investigator or notarized.

   Requests to withdraw complaints received through the mail, or otherwise not signed in the presence of a special investigator, should be verified with the complainant prior to submitting the request to the special investigations headquarters office for approval.

   If the complainant(s) specify that they are requesting withdrawal due to an understanding/settlement/agreement reached with the respondent(s), an appropriate letter to the complainant(s) (Exhibit 2-12), with a carbon copy to the respondent(s), shall be prepared by the special investigations headquarters office and sent via certified mail--return receipt requested. See Exhibit 2-12 for information on designation and distribution of various other copies of the letter.

   If the complainant(s) indicate that they are requesting withdrawal of their complaint for any reasons other than those indicated above, an appropriate letter to the complainant(s) (Exhibit 2-13), with a carbon copy to the respondent(s), shall be prepared by the special investigations headquarters office and sent via certified mail--return receipt requested. See Exhibit 2-13 for information on designation and distribution of various other copies of the letter.

6. **Backpay Determination for Discharge and Lay-off Complaints:** As a result of MSHA's filing a Section 105(c)(2) action with the FMSHRC, special investigators will assist complainant(s) in the preparation of documents to determine the amount of back-pay and interest owed the complainant(s). If interest on back pay is to be awarded to the complainants, the FMSHRC, in Local Union 2274, Dist. 28, UMWA v. Clinchfield Coal Company, 10 FMSHRC 1493 (Nov. 28, 1988), has adopted the short-term federal rate applicable to the under payment of taxes. This short-term federal rate is a change from the previous method used by the FMSHRC in computing interest on backpay awards and is the method currently being used by the NLRB. In adopting this new method, the FMSHRC has retained its previously used quarterly method of computation.

At the time the complaint is filed, the complaint processor will have provided the complainant(s) with a pamphlet entitled Information on Backpay for Miners (Exhibit 2-6) and a Claimant Expense and Search for Work Report Form (Exhibit 2-7).

The purpose of the Information on Backpay for Miners pamphlet is to initially inform the complainant(s) of their rights and responsibilities. The complainant's responsibilities include maintaining accurate records on interim earnings, expenses incurred, and their search for work which should be documented on the Claimant Expense and Search for Work Report (a copy of which is attached to the Information Pamphlet and is also included as Exhibit 2-7). The complainant will be required to provide the above data to MSHA on a calendar quarter basis if a determination is made that MSHA will pursue the complainants' case with the FMSHRC.

The following are general items which should be conveyed to the complainant(s) by the special investigator. Please note that the numerical reference in parentheses refers to the appropriate location of specific items found in the NLRB Manual.

--Backpay - 2 types: (NLRB 10530)

1. Gross backpay - The amount of money the complaint(s) would have earned had the alleged discriminatory action not occurred. (Formulas: NLRB 10534-10546)

2. Net backpay - Gross backpay less interim earning reduced by expenses. (NLRB 10530.1)

--Interim earnings - Money earned by complaint(s) during backpay period from interim employment. (NLRB 10530.1)

--Samples of items included in interim earnings:

1. Earnings from self-employment are considered "interim earnings" and are deductible from gross backpay. (NLRB 10602)

2. Tips and gratuities (i.e., barbers, cab drivers, waiters) are deductible as "interim earnings" from gross backpay. (NLRB 10602.1)

--Samples of items not included as deductible interim earnings:
(NLRB 10604.1)

1. Union benefits

2. Home relief payments

3. Unemployment insurance benefits

4. Workmen's compensation not attributed to lost wages

5. Earnings from overtime substantially in excess of overtime that would have been worked at original employer (respondent).
(NLRB 10604.3)

--Moonlighting - General Rule (NLRB 10606)

If complainant(s) held a second job prior to alleged discrimination and continued to hold that second job during the backpay period, earnings are not deductible as "interim earnings" from gross backpay.

--Expenses deductible from interim earnings
(NLRB 10610)

1. Extra transportation costs incurred in finding and keeping interim employment

2. Employment agency fees

3. Room and board when complainant(s) works away from home

4. Moving expenses (family and household)

5. Union dues if a condition of employment

NOTE: Expenses are irrelevant if incurred in a quarter with no interim earnings, but should be documented. (For example, to prove a reasonable search for work.)

--Search for Work (NLRB 10616)

1. Complainant(s) (upon discharge, layoff, suspension, etc.) must make "reasonable efforts" to seek other employment.

   The special investigator should emphasize that the complainant must make "reasonable efforts" to search for work and document same. If the complainant fails to do so, the FMSHRC may disallow any or all of the backpay claimed as due to the complainant.

2. Maintaining records (on Claimant Expense and Search for Work Report):

   A. Register with State employment service (NLRB 10616.1)

   B. Record specific places and times work was sought (NLRB 10616.2)

--Unavailability for Work - Generally (NLRB 10612)

Due to:

1. Pregnancy (NLRB 10618.1)

2. Illness (NLRB 10618.2)

3. Military service (NLRB 10618.2)

4. Institutional confinement (NLRB 10618.2)

5. Attendance at educational institutions (NLRB 10618.3)

If MSHA has determined that a discriminatory act has occurred in violation of the Act, and requests that the Office of the Solicitor file on behalf of the complainant with the FMSHRC, all information relative to the complainant's backpay, interim earnings, expenses, etc., will need to be provided to the headquarters special investigations office so that the interest due on backpay may be computed. Headquarters only will work in conjunction with the appropriate Office of the Solicitor in determining the interest due, using the NLRB method, which incorporates appropriate Internal Revenue Service interest rates, the amount of which will be computed into the final net backpay due the complainant.

--INTEREST IS ONLY COMPUTED WHEN SETTLEMENT/PAYMENT DATE IS KNOWN.

--INTEREST IS ONLY COMPUTED BY THE HEADQUARTERS SPECIAL INVESTIGATION OFFICE.

Exhibit 2-1

Discrimination Complaint

U.S. Department of Labor
Mine Safety and Health Administration

Section A—This Block is for MSHA Use Only.

1. District	2. Field Office	3. Date Filed	4. Received By	Case Number

Section B—Complainant Completes the Rest of the Form

1. Complainant(s)—Person(s) Discriminated Against

a. Name(s) | b. Address(es) | c. Area Code/Phone Number(s)

2. Has the Discriminatory Action resulted in your being suspended, laid off, or discharged?

☐ Yes ☐ No

3. Date of Discriminatory Action	4. Kind of Job You had at Time of Discriminatory Action
5. Rate of Regular Pay at Time of Discriminatory Action	6. Number of Regular Hours Worked each Week
7. Rate of Overtime Pay at Time of Discriminatory Action	8. Average Number of Overtime Hours Worked each Week (Based on Last 12 Months of Work)

Section C—Respondent—Organization Committing Discrimination

1. Name of Company | 2. Address | 3. Area Code/Phone Number

4. Mine ID Number (if known) | 5. Mine Name | 6. Mine Area Code/Phone Number

Section D—Person(s) Responsible for Discriminatory Action

1. Name(s) | 2. Job Title(s)

Section E— If You desire that a copy of all correspondence addressed to you from MSHA be provided to a representative (e.g., union representative, attorney, etc.) please give his/her name and address to the right.

Please use MSHA Form 2000-124, Discrimination Report, to provide a summary of your complaint explaining what discriminatory action was taken against you, including the date, time, and location of the action. Explain why you believe this action was discriminatory, and describe the relief being sought (for example, reinstatement, back pay, etc.).

Discrimination Report

U. S. Department of Labor
Mine Safety and Health Administration

Exhibit 2-2

Discrimination Complaint of (name(s))	Case Number

Summary of Discriminatory Action

Signature(s) of Complainant(s) Date

Discrimination Complaint Form 2000-123
General Instructions for Completion

The purpose of the form is to capture pertinent data from the Complainant on specific items as outlined below:

Section A - (To be completed by complaint processor)

Item 1 - District Office

Item 2 - Field Office

Item 3 - Date (complaint was) Filed

Item 4 - Received By (complaint processor)

Case Number - (Assigned by M/NM Headquarters special investigations office or CMS&H supervisory special investigator.)

Section B - (To be completed by Complainant) (Information requested is specific to each individual filing the complaint)

Item 1 - (a.) Name(s); (b.) Address(es); and (c.) Area Code/ Phone Number(s) (of each Complainant)

Item 2 - Has the discriminatory action resulted in your (Complainant) being suspended, laid off, or discharged?
(Check Yes or No block)

Item 3 - Date of discriminatory action

Item 4 - Kind of job you had (Complainant) at the time of discriminatory action

Item 5 - Rate of regular pay (Complainant) at the time of discriminatory action

Item 6 - Number of regular hours (Complainant) worked each week

Item 7 - Rate of overtime pay (of Complainant) at time of discriminatory action

Item 8 - Average number of overtime hours (Complainant) worked each week - based on (Complainant's) last 12 months of work

Section C - (To be completed by Complainant)
(Information requested is specific to each respondent [Company] listed in the complaint)

Item 1 - Name of company

Item 2 - Address (of company)

Item 3 - Area Code/Phone Number (of company)

Item 4 - Mine I.D. Number (if known)

Item 5 - Mine Name

Item 6 - Mine Area Code/Phone Number

Section D - (To be completed by Complainant)
(Information requested is specific to each individual listed in the complaint)

Item 1 - Name(s) (of persons responsible for the discriminatory action)

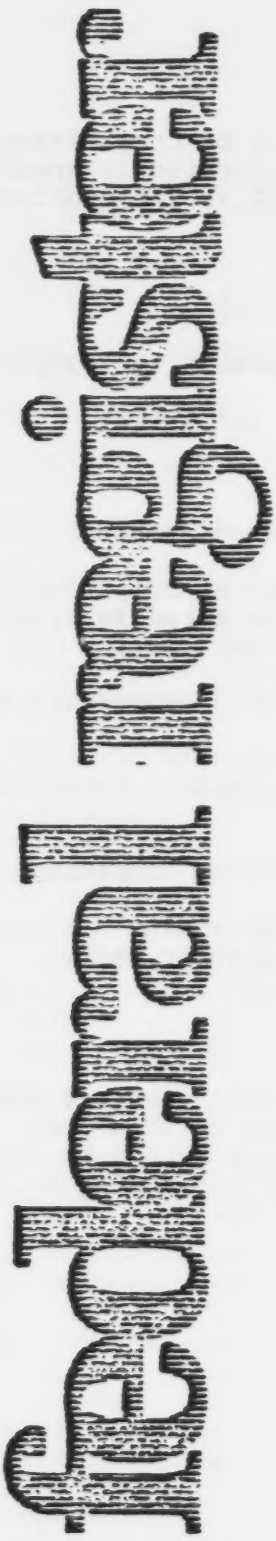
Item 2 - Job title(s) (Example: superintendent, mine foreman)

Section E - (To be completed by Complainant)

Should be completed if Complainant desires copies of correspondence forwarded to another party.

NOTE: Assure that Complainant does not begin the summary of discriminatory action on this form. Only the information specifically requested should be completed. The summary of discriminatory action should be completed on MSHA Form 2000-124 (Exhibit 2-2).

EXHIBIT 2-4



Friday
June 29, 1979

Part VII

Federal Mine Safety and Health Review Commission

Rules of Procedure

Complaint of Discharge, Discrimination or Interference

§ 2700.40 Who may file.

(a) *The Secretary.* A complaint of discharge, discrimination or interference under section 105(c) of the Act, 30 U.S.C. § 815(c), shall be filed by the Secretary after an investigation under section 105(c)(2) of the Act, if he finds that a violation of section 105(c)(1) of the Act has occurred.

(b) *Miner, representative, or applicant for employment.* A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred, or if the Secretary fails to make a determination within 90 days after the miner complained to the Secretary.

§ 2700.41 When to file.

(a) *The Secretary.* A complaint of discharge, discrimination or interference shall be filed by the Secretary within 30 days after his written determination that a violation has occurred.

(b) *Miner, representative, or applicant for employment.* A complaint of discharge, discrimination or interference may be filed by a complaining miner, representative of miners, or applicant for employment no more than 30 days after receipt of a written determination by the Secretary that no violation has occurred.

§ 2700.42 Contents of complaint.

A complaint of discharge, discrimination or interference shall include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference; and a statement of the relief requested.

§ 2700.43 Answer.

Within 30 days after service of a complaint filed by the Secretary or a complainant, the respondent shall file an answer.

§ 2700.44 Temporary reinstatement proceedings.

(a) *Contents of application; procedure; hearing.* An application for reinstatement shall state the Secretary's finding that the complaint of discrimination, discharge or interference was not frivolously brought and the basis for his finding. The application shall be immediately examined, and, unless it is determined from the face of the application that the Secretary's finding was arbitrarily or capriciously made, an order of temporary reinstatement shall be immediately issued. The order shall be effective upon issuance. If the person against whom relief is sought requests a hearing on the order, a Judge shall, within 5 days after the request is filed, hold a hearing to determine whether the Secretary's finding was arbitrarily or capriciously made. The Judge may then dissolve, modify or continue the order.

(b) *Dissolution of order.* If, following an order of reinstatement, the Secretary determines that the provisions of section 105(c)(1) have not been violated, the Judge shall be so notified and shall enter an order dissolving the order of reinstatement. If the Secretary fails to file a complaint within 90 days, the Judge may issue an order to show cause why the order of reinstatement should not be dissolved. An order dissolving the order of reinstatement shall not bar the filing of an action by the miner in his own behalf under section 105(c)(3) of the Act and § 2700.40 of these rules.

Exhibit 2-5

United States Department of Labor
Mine Safety and Health Administration

Notice of Conditions Under Which This Information Is Requested and Used

Pursuant to Section 3(e)(3) of the Privacy Act of 1974 (Public Law 93-579), the individual furnishing information on this form is advised as follows:

1. The authority for solicitation of the information is Section 105(c) of the Federal Mine Safety and Health Act of 1977 (Public Law 91-173 as amended by Public Law 95-164).

2. The principal purpose for the information requested is to assist the Mine Safety and Health Administration (MSHA) investigate the merits of the discrimination complaint being filed.

3. The routine uses of the information are:

   a. To allow the MSHA investigator to initiate the investigation of the discrimination complaint.

   b. With regard to Page 2 of the complaint form which asks for a "Summary of Discriminatory Action," a copy of this page will be provided to the respondent(s) by MSHA as required by the provisions of Section 105(c).

4. The effect on the individual of not providing all or any part of the requested information would be to hinder the initiation, conduct, and completion of the investigation, and delay decisions on whether the complaint was not frivolously brought and whether discrimination occurred in violation of Section 105(c).

Exhibit 2-6

INFORMATION ON BACKPAY FOR MINERS

NOTICE

YOU MAY BE ENTITLED TO BACKPAY

Read this information carefully and follow each instruction to ensure that you will receive all the money which you may have coming.

1. PURPOSE OF THIS LEAFLET

You, or your representative, have filed a 105(c) discrimination complaint under the 1977 Federal Mine Safety and Health Act. This may result in a decision by an Administrative Law Judge of the Federal Mine Safety and Health Review Commission (FMSHRC) that you have been illegally discharged, laid off, demoted, or refused employment. The FMSHRC may decide that you are entitled to backpay because of this. We will need your help to find out how much the backpay may be. The purpose of this leaflet is to tell you what backpay is and how you can help us. It is important to remember, however, that the charges concerning your complaint may be dismissed. If this happens, you will not receive backpay.

2. WHAT IS BACKPAY?

Backpay has two parts. The first is what you would have earned if the mine operator had not violated the law and caused you to be discharged, suspended, laid off, demoted or refused employment. This is called gross backpay. The second part is what you earn while you are kept from your rightful job. This is called interim earnings. The backpay due you is the difference between gross backpay and interim earnings. To use a simple example, suppose you were making $200 a week before you were discharged. The FMSHRC finds that you were illegally discharged and orders that you be paid for loss of earnings. Immediately after being discharged, you take another job for $150 a week. Then, 10 weeks after your discharge, the operator who illegally discharged you offers you your old job. The gross backpay is $2,000 ($200 per week for 10 weeks) and your interim earnings are $1,500 ($150 per week for 10 weeks). Thus, your backpay would be $500 ($2,000 minus $1,500).

This calculation for backpay is normally computed for every calendar quarter during which you were entitled to backpay and the backpay due you for a particular quarter will normally not be offset by additional interim earnings from a different calendar quarter.

3. **ARE YOU EMPLOYED NOW OR LOOKING FOR WORK?** (Read what follows very carefully, it is important)

YOU WILL NOT GET BACKPAY FOR TIMES WHEN YOU ARE UNEMPLOYED AND DO NOT LOOK FOR WORK OR ARE UNABLE TO WORK.

You must make a real and sincere effort to obtain work even though you may have been illegally discharged. If you decide to take a fishing trip for a month rather than look for a job, you may not get backpay for that month. If you decide to be a full-time homemaker or go back to school or college full-time, you may not qualify for backpay until you again start looking for a full-time job. Therefore, we must know whether you were looking for work by going to employers, by registering with your state employment service (or unemployment insurance office) and in various other ways. You may not remember names of places where you apply for work and are turned down unless you keep a written record of your search for work on a daily or weekly basis. We have provided a form, Claimant Expense and Search for Work Report, for the purpose of keeping a record of the expenses you have while searching for employment (such as mileage, phone calls, motels, parking fees, etc.) and this form will also provide a convenient record of your search for work.

YOU WILL BE ABLE TO SHOW THAT YOU LOOKED FOR WORK BY DOING THE FOLLOWING THINGS:

1. Register at your local employment service (or unemployment insurance office). Keep a record on the Claimant Expense and Search for Work Report (Part I,A) and keep whatever registration card or record that office gives you. Note the date of your registration and the location of the office. When you receive unemployment insurance benefits, keep all records which show the dates of payment of the benefits, etc. If you register with any other state, private, or union employment agency, this information must also be recorded.

2. Whenever you apply or ask for a job, keep a record on the Claimant Expense and Search for Work Report, (Part I,B) on the date you asked for work, the name of the employer, its location, whom you talked to and what was said (e.g., "Sorry, we have no work for you," or "We will let you know if a job opens", etc.)

3. You must also list in the space provided (Part I,C) the dates and reasons why you were unavailable for work for any period of time during the calendar quarter.

4. If you become employed by another employer, but for any reason lose the job, before the operator from which you were illegally discharged asks you to return to work, you must again make a real and sincere effort to obtain work in the manner discussed above.

4. **YOUR INTERIM EARNINGS**

When you do find another job, you must keep a record of the name and address of the employer, the job classification, when you start, how much you earn, how long you continue working at the job and why your employment ended. Keep this information on Part II,B, of the Claimant Expense and Search for Work Report. In addition, keep all records that show what you earn at these other jobs, including pay stubs, W-2 forms or any other record of your earnings.

5. **YOUR EXPENSES**

You may have to spend money looking for other work or holding another job and you be may entitled to deduct these expenses from your interim earnings. It is important to keep a record of these expenses on the enclosed Claimant Expense and Search for Work Report (Part II,A).

FOR EXAMPLE: On your new job, you may have to pay more money to get to and from work than you had to pay with your old job. You may be entitled to the increased cost as an expense. You may have spent bus fare or used a car looking for work. You may have paid employment agency fees to get a job. You may have had to pay union initiation or work permit fees or dues to keep a job. You may be entitled to a credit for those expenses when your backpay is calculated. Therefore, it is very important to keep a record of all your expenses on the Claimant Expense and Search for Work Report form.

In your search for work, you should record your mileage, parking fees, public transportation expenses, etc., on Part II,A, of the form. Maintain the Claimant Expense and Search for Work Report form until the MSHA special investigator investigating your case requests that you provide the form to him/her or until such time as you are notified that MSHA has determined that no violation occurred.

If the alleged discriminatory action results in your incurring an unusual loss, such as the loss of a car, truck, or home due to your not being able to make the payments, you should document and maintain all information pertinent to that loss and notify the MSHA special investigator assigned to your case immediately.

6. **KEEPING RECORDS**

In addition to recording the necessary information on the form we have provided, you should keep all the records you have on applications made for claim on your own behalf.

7. **WHEN DO YOU GET YOUR BACKPAY?**

If you help by doing the things listed above, we will be able to figure out your backpay without delay. This assumes, of course, that the FMSHRC decides that you are entitled to backpay. Not all cases take the same time. Therefore, we cannot tell you now, when, or if you will get backpay.

REMEMBER TO TELL THE MSHA SPECIAL INVESTIGATOR ABOUT ANY CHANGE IN YOUR ADDRESS

KEEP THIS PAMPHLET FOR YOUR INFORMATION

CLAIMANT EXPENSE AND SEARCH FOR WORK REPORT

YOUR NAME AND CURRENT ADDRESS	PERIOD COVERED BY THIS REPORT (Check One)	
	☐ JAN 1 - MAR 31, ____ (Year)	☐ APR 1 - JUN 30 ____ (Year)
	☐ JUL 1 - SEP 30, ____ (Year)	☐ OCT 1 - DEC 31, ____ (Year)

CASE NUMBER	CASE NAME

PART I

A LIST ALL STATE PRIVATE AND UNION EMPLOYMENT SERVICES WHERE YOU REGISTERED FOR WORK DURING THIS QUARTER. LIST THE DATE YOU REPORTED TO THEM AND LIST THE COMPANIES AND DATES WHEN YOU WERE REFERRED FOR WORK

DATE VISITED	NAME AND ADDRESS OF EMPLOYMENT SERVICE	REFERRED FOR WORK? YES	NO	DATE	NAME AND ADDRESS OF COMPANY

B SEARCH FOR EMPLOYMENT LIST ALL OTHER PLACES WHERE YOU LOOKED FOR WORK THIS QUARTER

DATE	NAME AND ADDRESS OF COMPANY	COMPANY RESPONSE (What was said? By Whom?)

C LIST ALL PERIODS OF TIME DURING THIS QUARTER WHEN FOR ANY REASON YOU WERE UNABLE TO WORK. (For example, because of illness, pregnancy, vacations, military service, jail, layoff, strike duty, etc.)

DATES FROM	DATES TO	REASON

Exhibit 2-7
Continued

PART II

A LIST ALL EXPENSES RELATED TO SEARCHING FOR WORK AND/OR HOLDING ANOTHER JOB (KEEP ALL RECORDS). FOR AUTOMOBILE EXPENSE LIST TRIP MILEAGE FOR ALL OTHER EXPENSES SHOW DOLLAR AMOUNT

DATE	MILEAGE	PHONE CALLS	OUT OF TOWN		PARKING	LIST TYPE AND AMOUNT OF ANY OTHER EXPENSE
			MEALS	LODGING		

B KEEP A RECORD OF ALL THE FOLLOWING INFORMATION FOR EVERY JOB YOU HOLD DURING THIS CALENDAR QUARTER

DATES OF EMPLOYMENT	NAME AND ADDRESS OF EMPLOYER	JOB TITLE	GROSS WEEKLY PAY	REASON FOR LEAVING THIS EMPLOYER
FROM TO				
FROM TO				
FROM TO				
FROM TO				
FROM TO				
FROM TO				
FROM TO				

Exhibit 2-8

Letter to Complainant When Inquiry Received
By Mail or Telephone

Complainant's Name
Street Address
City, State Zip Code

Dear Mr./Ms.

With regard to your (letter or telephone call) on (date), we are enclosing a Discrimination Complaint Form which must be completed and returned to (address of nearest MSHA office).

The form should be filled in as completely and accurately as possible and returned as quickly as possible, even if you cannot provide all of the requested information.

The Federal Mine Safety and Health Act of 1977 provides that a miner may, within 60 days after a discriminatory action occurs, file a complaint with MSHA. If 60 days have elapsed prior to (your letter or phone call), please attach a letter explaining why the complaint was not filed within the 60-day period. If you have any questions, please contact me at the address listed above or call (name of designated person at local office) at (telephone number).

Sincerely,

(Complaint Processor or other designated person)

Enclosures: 5

Complaint Forms 2000-123 and 124
Federal Mine Safety and Health Review Commission Rules of Procedure
Privacy Act Statement
Information on Backpay for Miners
Claimant Expense and Search for Work Report

Exhibit 2-9

Complainant's Name
Street Address
City, State Zip Code

Re: Discrimination Complaint Case Number _____

Dear Mr./Ms.

The discrimination complaint you recently filed with the Mine Safety and Health Administration (MSHA) (copy attached) has been assigned to the special investigator whose name appears below. Any questions you have concerning this case should be directed to this investigator.

The investigator will contact you concerning the investigation of your complaint. Please retain any evidence related to your complaint, such as time cards, notifications of personnel actions, disciplinary slips, notes, letters, memorandums, check stubs, etc. Also, it would be helpful if you would make a list of names, addresses and telephone numbers of individuals who can support your complaint, together with a brief summary of what each individual should know concerning the alleged discrimination.

Please give this information and your full cooperation to the investigator. Such action on your part will aid in an accurate and speedy completion of the investigation.

Sincerely,

(To be designated by the District Manager)

Enclosures (2)

Complaint Forms 2000-123 and -124

_____, Special Investigator

Telephone: _____

bcc: Case File

Exhibit 2-10

Respondent's Name
Company Name
Street Address
City, State Zip Code

Re: Discrimination Complaint Case Number_____
Filed by _____

Dear Mr./Ms.

Attached please find a copy of a discrimination complaint filed under Section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainant alleges that he/she has been discriminated against by you or your company.

The Mine Safety and Health Administration has assigned an investigator, who will contact you or an agent of your company during the fact-finding segment of this investigation. If you have any questions, you may write or call _____, Special Investigator, at _____.

Also attached for your information is a copy of excerpts from the Federal Mine Safety and Health Review Commission's "Rules of Procedure."

Sincerely,

(To be designated by the District Manager)

Enclosures (2)

Complaint Form 2000-124
Federal Mine Safety and Health Review Commission Rules of Procedure

bcc: Case File

Exhibit 2-11

DISCONTINUANCE OF DISCRIMINATION COMPLAINT

CASE NO. _____

My name is _____,

and I am the listed complainant of the discrimination complaint,

_____

versus _____ filed _____.

I wish to discontinue any additional action concerning this complaint. I furthermore state that I make this request voluntarily and without coercion from anyone.

_____
(Signature)

_____ Day of _____
(Month/Year)

_____ _____
(Witness) (Investigator)

- - - - - - - - - - - - - - - -AND/OR - - - - - - - - - - - - - - - -

Subscribed and sworn to before me this _____ day of _____

19____.

_____
NOTARY PUBLIC

Exhibit 2-12

Complainant's Name
Street Address
City, State Zip Code

Re: Investigation of Your Discrimination Complaint
Case Number_____

Dear Mr./Ms.

Your complaint of discrimination filed under Section 105(c) of the Federal Mine Safety and Health Act of 1977 has been investigated by a representative of the Mine Safety and Health Administration (MSHA).

A review of the information gathered during the investigation indicates that the complaint has been satisfied.

Your request for withdrawal of the complaint has been approved and, with this approval, the case is closed.

Sincerely,

Chief, Office of Metal/Nonmetal
Special Investigations
OR
Chief, Office of Technical Compliance
and Investigation

cc: Respondent's Name, Title
Name of Company
Street Address
City, State Zip Code

bcc: Supervisory Special Investigator
District Manager
Case Files
Headquarters

Exhibit 2-13

Complainant's Name
Street Address
City, State Zip Code

Re: Results of Discrimination Investigation
Case Number _____

Dear Mr./Ms.

Your request to withdraw the complaint in the above case has been approved. With this approval, the case is closed.

Sincerely,

Chief, Office of Metal/Nonmetal
Special Investigations
OR
Chief, Office of Technical Compliance
and Investigation

cc: Respondent's Name, Title
Name of Company
Street Address
City, State Zip Code

bcc: Supervisory Special Investigator
District Manager
Case Files
Headquarters

Exhibit 2-14

105(c) DOCUMENTATION LOG

Case No.	Date Case Filed	Type of Complaint	Complainant v Respondent	Company Name	Mine Name	Mine I.D.	Investigator Name	15-Day Start Date	45-Day Due Date	90-Day Due Date	Date Report Mailed	Case Status

CHAPTER III - INJUNCTIVE ACTIONS AND ASSAULTS ON INSPECTORS

A. INTRODUCTION

This chapter contains the procedures for obtaining injunctive relief when inspectors are denied entry or when mine operators work against closure orders. It also contains guidance on how to deal with situations involving assault or harassment of inspectors or attempts to delay inspections.

Section 103(a) of the Act provides the statutory right of entry for Authorized Representatives of the Secretary. A denial of entry, therefore, constitutes a violation of the Act.

Section 108 contains the statutory provisions for injunctive relief that the Secretary may take when denied entry to the mine, or for other reasons as stipulated in the MSHA Program Policy Manual. (Program Policy Letter No. P89-I-1.)

When an injunctive action is contemplated, first establish whether or not the operation falls under the jurisdiction of the Act. Proof that the mined product enters or affects interstate commerce must be provided. Section 3(h)(1) of the Act defines a coal or other mine which is subject to the provisions of the Act. (See Chapter IV Establishing Jurisdiction).

B. DEFINING INJUNCTIVE ACTIONS

An injunction is an order from a United States District Court commanding a person to do something (e.g., allow entry) or to refrain from doing something (e.g., working against an order of withdrawal). The failure or refusal to comply with any type of injunction is punishable by contempt of court proceedings. There are two preliminary steps to an injunctive action--a Temporary Restraining Order (or a preliminary injunction) and the permanent injunction.

1. Temporary Restraining Order (TRO): A Temporary Restraining Order may be issued by a court based on the argument and showing of only one party (an ex parte proceeding), for example MSHA, if it can be shown that irreparable harm to the party or case will result if it is not granted. These are not generally sought by the Office of the Solicitor but could be pursued if, for example, an operator was working against a 107(a) Order of Withdrawal.

2. Preliminary and Permanent Injunctions: These are usually sought in the same action but in two phases--preliminary and permanent. A preliminary injunction is an order issued after

a hearing with both parties present, but is still pending a full hearing. The requesting party must show that damage will result if an injunctive order is not issued to prevent the other party from doing something. A permanent injunction is the final order requiring the party to do what the order requires. The injunctive order is issued after a full hearing or trial.

C. ACTIONS WHICH MAY LEAD TO A REQUEST FOR INJUNCTIVE RELIEF

1. Introduction: Injunctive relief will be requested by the District, Assistant District or Subdistrict Manager having jurisdiction over the particular mine. Most probably, the inspector will be the person involved in the initial action leading to a request for an injunction. Injunctive actions may be requested when: (1) there has been a denial of entry; or, (2) when the operator is working in violation of a Withdrawal Order, or a 103(j) or (k) order, as explained below.

2. Denials of Entry: Denials of entry may be classed into two main types: (1) direct denials involving a confrontation; and, (2) indirect denials involving interference, delays and/or harassment. (Reference Program Policy Manual, Program Policy Letter No. P89-I-1.)

In view of the particular types of denials which may be encountered, several preliminary determinations must be made by the inspector before an injunctive action is requested.

Upon being denied right of entry, the inspector should first attempt to determine the reason for the denial. The procedures to be followed for each type of denial of entry are outlined below:

a. Denials not involving MSHA's statutory authority: When the operator or his/her agent informs an inspector that an inspection of the mine will not be permitted, and no challenge is made concerning MSHA jurisdiction, the following actions should be taken if the inspector can safely do so:

The inspector should explain to the operator or his/her agent the mandatory inspection requirements in Section 103(a) of the Act and that there will be a citation issued and penalty assessed for the denial of entry.

If after explaining MSHA's position to the operator, the inspector is still denied entry to the mine, the

inspector shall issue a 104(a) Citation, citing a violation of Section 103(a) and establish a reasonable time for abatement.

If upon the conclusion of the abatement period, the operator or his/her agent withdraws the denial and permits the inspection, the inspector should terminate the citation. However, if the operator or his/her agent still denies entry to the mine, the inspector should issue an Order of Withdrawal (define the area affected by the order as "no area affected" unless specific hazards are present), and notify the immediate MSHA supervisor so that an injunctive action may be considered.

b. Denials involving MSHA's statutory authority: When the operator or his/her agent refuses to permit an inspection based upon the belief that MSHA does not have the right or authority to inspect the mine, the inspector should explain to the operator or his/her agent the mandatory inspection requirements under Section 103(a) of the Act, and that there will be a citation and penalty assessed for the denial of entry. The inspector should carefully note the operator's response as to why the mine is not subject to the Act, then proceed as in (A) above.

c. Indirect denials--delays, interferences, or harassment: When the mine has an I.D. number and the operator or his/her agent is known and present and does not verbally refuse right of entry, but takes indirect action to prevent inspection of the mine, the inspector should explain: (1) the particular actions which are considered to be a denial of entry; (2) the mandatory inspection requirements and/or supplementary (spot) inspection requirements under Section 103(a) of the Act; and, (3) that there will be a citation and penalty assessed for the denial of entry. If after explaining MSHA's position to the operator, the inspector is still denied entry to the mine, a 104(a) Citation shall be issued, citing a violation of Section 103(a).

If upon the conclusion of the abatement period, the operator or his/her agent permits the inspection, the inspector should terminate the citation. However, if the operator or his/her agent still denies entry to the mine, an Order of Withdrawal shall be issued. (Unless the specific hazards are obvious, define the area affected by the Order as "no area affected.")

The immediate MSHA supervisor should be notified so that injunctive procedures may be considered.

When the mine has an I.D. number and the operator or his/her agent is known but is not present, and access to the mine is indirectly denied, the inspector should notify the immediate MSHA supervisor, issue a 104(a) Citation for a violation of Section 103(a), and mail the citation to the operator by certified mail, return receipt requested. The inspector should return to the mine site at the conclusion of the abatement period and terminate the citation if an inspection is allowed. If entry is still denied, issue an Order of Withdrawal (unless other hazards are present, the area affected by the Order should be "no area affected") if entry is still denied, and notify the MSHA supervisor of the action taken so that injunctive actions may be considered.

When the mine does not have an I.D. number and the operator or his/her agent is unknown, and access to the mine is indirectly denied, the inspector should notify the MSHA supervisor, and assist in identifying the mine property and property owner to determine jurisdiction. When the property is identified and jurisdiction has been established, the inspector and/or the supervisor should meet with the operator or the agent and demand access.

The operator or the agent must be informed that he/she has been identified as the operator, owner, lessee, etc.; that MSHA has evidence that the operation is under the jurisdiction of the Act; and be given a description of the circumstances which prevented access. The inspector should then explain the statutory right of entry and again attempt to gain entry to the mine property. Should a denial of entry again occur, the inspector and/or the supervisor should take appropriate action depending upon the type of denial received, as previously discussed.

3. **Working Against Withdrawal Orders**: When an inspector encounters an operator working in violation of any order of withdrawal, the inspector shall, if possible or necessary, enter the mine, observe the operations, note the activity which is in violation of the outstanding Order of Withdrawal, and list the names of witnesses present. The inspector shall then issue a separate 104(a) Citation for failure to comply with each order violated.

If the order is complied with, that is, persons are withdrawn and prohibited from entering the affected area or using the equipment, the citation for working against the order will be terminated. However, if the operator continues to work in violation of the order, the inspector should immediately consult with the MSHA supervisor, without terminating the 104(a) Citation for working against the order unabated. It is not necessary to write another order.

D. **PROCEDURES AND RESPONSIBILITIES FOR INITIATING AN INJUNCTIVE ACTION**

1. Inspection Supervisor: When an inspector reports a denial of entry or working in violation of an Order of Withdrawal, the inspection supervisor should immediately contact the Subdistrict/Assistant District Manager; assist in preparation of the inspector's summary memorandum; and, if advised, assist in preparation of the inspector's affidavit (Exhibit 3-1).

2. Subdistrict/Assistant District Manager: The Subdistrict/Assistant District Manager (or designee of the District Manager) shall be the person primarily responsible for requesting and coordinating injunctive actions in the district office.

   When this Manager determines that injunctive relief should be requested, the following actions should be taken:

   Review the decision with the District Manager. If the District Manager concurs, obtain a case number and magnafax the inspector's memorandum to the special investigation headquarters office.

   Contact the Regional Solicitor by phone and discuss the case for any special instructions.

   Have an affidavit prepared by the inspector (Exhibit 3-1).

   Establish a case file for the material, labeling it with the case number.

   Direct the collecting of necessary information. Assemble the case materials in the case file for transmission (affidavit, citations, orders, jurisdictional information, etc.).

Transmit copies of the case file to the appropriate Office of the Regional Solicitor and to the special investigation headquarters office.

When a Subdistrict/Assistant District Manager determines that an imminent danger order is not being complied with, the following actions should be taken:

Consult with the District Manager, and if the District Manager concurs, obtain a case number and advise the special investigations headquarters office by telephone.

Contact the Office of the Regional Solicitor by phone, describe the order, danger and regulation violation, if appropriate, to an attorney, as well as the circumstances of noncompliance and request assistance and advice.

Unless the attorney advises otherwise, proceed as indicated in Items (A) through (F) above.

3. Supervisory Special Investigator: The Supervisory Special Investigator will be responsible for:

Advising and assisting the inspector, supervisor, Subdistrict/Assistant District Manager and District Manager.

Informing the District Manager of all developments.

Advising headquarters of all pending cases.

Monitoring case progress and litigation for the District Manager, in conjunction with headquarters staff.

4. District Manager: The District Manager shall report the status of all injunctive cases to the Administrator by the 15th of each month.

5. Office of the Solicitor: The Department of Labor's Regional Offices of the Solicitor have the responsibility for advising MSHA whether or not injunctive relief is advisable and/or possible.

Therefore, the merits of a case, as well as the sufficiency of information, must be determined by those offices.

E. PROCEDURES UPON RECEIPT OF INJUNCTION

Upon notification by the Regional Solicitor that an injunction has been granted, the District Manager shall decide whether service of the injunction can be safely made by MSHA personnel. In appropriate circumstances, the District Manager may request that the Regional Solicitor arrange for service accompanied by a U.S. Marshal.

Upon receipt of the injunction, the Subdistrict/Assistant District Manager shall transmit, by memorandum, the injunction within 2 days of receipt to the appropriate field office. The transmitting memorandum shall direct inspection within 15 days, and contain an instruction on the certificate of service. A copy of the memorandum and injunction shall be placed in the case file.

Upon receiving the injunction, the inspection supervisor shall accompany the inspector assigned to the mine. The supervisor shall serve a copy of the injunction to the operator and accompany the inspector on the first day of the inspection. Upon return to the office, the supervisor shall complete a certificate of service (Exhibit 3-2) and forward it to the Subdistrict/Assistant District Manager for inclusion in the case file. Upon completion of the inspection, a copy of the inspection report shall be forwarded to the Subdistrict/Assistant District Manager for inclusion in the case file.

Upon notice that an injunction has been served accompanied by a U.S. Marshal, the supervisor shall accompany the inspector assigned to the mine on the first day of inspection. Upon completion of the inspection, a copy of the inspection report shall be forwarded to the Subdistrict/Assistant District Manager for inclusion in the case file.

When the inspection report and certificate of service are received, copies should also be transmitted to Arlington, noting that the case is closed.

If the operator, after service of the injunction, does not comply with the Court's order to obey a withdrawal order, or to permit inspection (when served or at any other time), the supervisor and inspector shall record in their notes as much as possible of the incident (at the time, if it can be safely done) and return to the office and contact the Subdistrict/Assistant District Manager, who shall inform the District Manager.

The District Manager should:

Immediately contact the attorney handling the case for advice and assistance.

Notify Arlington by phone of the noncompliance and of the Solicitor's instructions.

F. ASSAULT OR HARASSMENT OF INSPECTORS

1. Introduction: Section 1114 of Title 18 of the United States Code makes it a Federal crime to kill any of the officers or employees of the United States who are listed in Section 704. Section 704 added officers and employees who are assigned to perform investigative, inspection, or law enforcement functions, to the list of officers and employees of the United States protected under Section 1114. Prior to the enactment of Public Law 95-87, such employees were not included under this protection.

   Section 111 of Title 18 of the United States Code makes it a Federal crime to forcibly assault, resist, oppose, impede, intimidate or interfere with any person designated in Section 1114 of Title 18 while such person is engaged in, or on account of, the performance of his/her official duties. Therefore, as a result of the amendment to Section 1114, it is a crime to assault or harass (as stated above) MSHA employees who are assigned to perform investigative, inspection, or law enforcement functions. This means that any person who assaults an MSHA inspector, while such inspector is engaged in, or on account of, the performance of his/her official duties, is subject to investigation and arrest by the FBI and prosecution by the U.S. Attorney in the Federal courts.

2. Procedures to Follow: MSHA procedures require the inspector to leave the scene of any confrontation which appears to be developing into a situation where an apparent violation of Section 1114 or 111 is about to occur. In an attempt to avoid a confrontation, the inspector may now inform the person(s) that an attack on an MSHA inspector is a Federal crime, and they may be subject to investigation and arrest by the FBI. If an inspector believes that he/she may be subject to physical harm or assault, he/she should leave the property immediately and promptly notify his/her supervisor. If the inspector encounters harassment or delays during a mine inspection, an attempt should be

   made to complete the inspection, if possible, without further provoking the operator; then the supervisor should be contacted.

In the event of an assault, harassment, or impeding an inspection, the supervisor shall be responsible for collecting all the facts, reducing them to writing, and contacting the Subdistrict/Assistant District Manager. In egregious situations, telephone contacts may be made, with the written documentation to be prepared later. The Subdistrict/Assistant District Manager should then immediately contact the District Manager who will notify the appropriate special investigations headquarters office for further instructions. If the inspection is not the result of an imminent danger complaint, no inspection personnel should return to the mine without headquarters' approval. If it is an imminent danger complaint, an inspector and supervisor should again attempt inspection. No less than two inspection personnel should be sent to the mine property at one time.

Exhibit 3-1

AFFIDAVIT

_____, being duly sworn according to law deposes and says:

1. I am a Federal (Coal or Metal and Nonmetal) Mine Inspector, employed by the United States Department of Labor, Mine Safety and Health Administration and assigned to _____ (Office Location), I have personal knowledge of the facts and circumstances stated herein.

2. On _____ (Date), I was assigned to make a _____ (Type) inspection of _____ (Name of Mine) owned by _____ (Name of Owner), pursuant to the Federal Mine Safety and Health Act of 1977, Public Law 91-173, as amended by Public Law 95-164.

3. Pursuant to my assignment, on _____ (Date), I traveled to said mine. Upon my arrival at _____ (Time) (a.m.) (p.m.) I identified myself to _____ (Name), _____ (Title if Known), of the mine, and communicated my assignment to inspect.

4. (Here briefly describe the actual denial or inspector's observations that mine was working.) Example: _____ (Name) refused to permit my inspection by stating "_____ (What was said)."

5. I then informed _____ (Name) of the Statutory Right of Entry under Section 103(a) of said Act. After _____ (Time Elapsed), I again asked _____ (Name) if inspection would be permitted. He/she again refused stating "_____ (What was said)." I then left the mine property.

_____
(Signed - Inspector)

This Statement was signed and sworn before me on _____/_____/_____. (Day) (Month) (Year)

(Seal) _____ (Notary)

My Commission Expires _____/_____/_____. (Day) (Month) (Year)

Exhibit 3-2

Certificate of Service

I, _____ (Name), do hereby certify that I am an Authorized Representative of the Secretary of Labor. On _____ (Date), I was assigned to make an inspection of _____ (Mine Name) in _____ (City/County,) _____ (State).

Upon arrival at this mine at _____ a.m./p.m. I served _____ (Name and Title) with a copy of the order issued by the Honorable _____ (Judge's Name), Judge of the United States District Court for the _____ District of _____ (State) in Civil Action _____ (Case Number From Order).

By: _____

Sworn to and subscribed before me this _____ (Date) day of _____ (Month), _____ (Year)

_____

My Commission Expires _____ (Month) / _____ (Day) / _____ (Year)

CHAPTER IV - SECTION 110 INVESTIGATIONS

A. INTRODUCTION

Title I of the Federal Mine Safety and Health Act of 1977 establishes the overall enforcement mechanism to ensure compliance with established health and safety standards. These enforcement mechanisms exist at various levels which increase in severity to the point where a violation may be the subject of criminal prosecution. Exhibit 4-1 depicts these various levels of enforcement.

B. LEGAL DEFINITIONS

In reference to Section 110(c) of the Act, a precedent decision defined "knowingly" as follows:

> [T]he term "knowingly" as used in the Act . . . does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.[1]

MSHA must show, by a preponderance of evidence, that a civil violation occurred which may result in the assessment of a civil penalty against any director, officer or agent of a corporation. It is expected that the majority of cases involving special investigations will fall into this category.

The most severe enforcement actions that can be taken involve criminal penalties contained in the statutory provisions of Sections 110(d), (e), (f), and (h).

To prevail in charges under Section 110(d) alleging willful violations of the Act, the Government must establish beyond a reasonable doubt, that any operator, "willfully" violated any mandatory health or safety standard or other provision of the Act. The Sixth and Fourth Circuit Courts of Appeals have defined a "willful" violation as:

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[1] Secretary of Labor (MSHA) v. Kenny Richardson, Docket No. BARB 78-600-P, July 12, 1979, 4 FMSHRC 874.

> The failure to comply with a mandatory health or safety standard is 'willful' if done knowingly and purposely by a mine operator who, having a free will and choice, either intentionally disobeys the standard or recklessly disregards its requirements.[2]

The Fourth Circuit Court of Appeals has defined reckless disregard as:

> The closing of the eyes to or deliberate indifference toward the requirements of a mandatory safety standard which standard defendant should have known and had reason to know at the time of the violation.[3]

When bringing Section 110(d) charges, a strict (or literal) construction of the Act must be used. The Act or the regulation violated will be interpreted precisely and implication or indirect meanings will not be recognized. The court will take the language used in its precise and technical meaning.

C. **INITIATING SECTION 110 INVESTIGATIONS**

1. **General:** Investigations are fact-finding exercises. The investigation of a possible Section 110 violation of the Act is usually initiated under the following circumstances:

   a. After a mine accident;

   b. As a result of complaints received alleging possible violations of Section 110(e) (advance notice), 110(f) (false reporting), and 110(h) (equipment misrepresentation); or,

   c. At the request of the District Manager as a result of reviewing citations/orders for possible violations.

   Special investigators **do not** conduct internal investigations into allegations against MSHA employees. Possible violations of Section 110(e), advance notice of inspections, shall be immediately forwarded to the headquarters office. All other special investigations shall be conducted by the District special investigators.

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[2] U.S. v. Consolidation Coal Co. & Kidd, 504 F 2nd, 1330, 1335 (1974)

[3] U.S. v. Kyle Jones, Gary Niel, 735 F 2nd, 785 (1984)

2. **Review of Citations and Orders:** The issuing inspector of those citations and orders specified by the MSHA Program Policy Manual will complete all items through the Inspector's Conclusion on the Possible Knowing/Willful Violation Review Form 7000-20 (Exhibit 4-2). The inspector and his/her supervisor will review the issuance jointly. The Violation Review Form, citation or order, modifications (if issued), Legal Identity form, inspectors notes, and any other supporting documentation will be forwarded to the next level of review indicated on the form for immediate review and comment. This package will be forwarded separately from any other inspection-generated documents. Exhibit 4-2 will be considered confidential, pre-decisional information and not generally releasable under FOIA. These documents shall be maintained only in the special investigation files and shall not be maintained in the regular inspection files.

   The supervisory special investigator shall review the violations against the MSHA Program Policy Manual criteria for a possible knowing and willful violation. Within 21 calendar days from the date of issuance, a determination will be made by the district manager, with the assistance of the supervisory special investigator, whether to initiate an investigation, conduct a preliminary inquiry, or take no further action.

   A documentation log (i.e.: Exhibit 4-3) shall be established and maintained by the supervisory special investigator to support whatever action is taken. If the action initiated is a preliminary inquiry or special investigation, the documentation will be in the form of the case file report itself. If the decision is that no further action is justified, the supervisory special investigator and/or District Manager will author a memorandum to the file outlining the reasons for not pursuing the issue. A copy of the memorandum shall be sent to all persons involved in that review. The supervisory special investigator will be responsible for maintaining the documentation, as specified in the MSHA Program Policy Manual.

3. **Preinvestigation Research:** Prior to contacting any principals in the preliminary inquiry or investigation, the investigator should first determine if there are any prior or current Section 110 or 105(c) cases, which may have a bearing on the case. Such information will

normally be available from the supervisory special investigator or from the special investigations headquarters office. Both the Department of Justice and the Office of the Solicitor desire that this background information, as well as the violation history and accident and fatality data, be included in the final report of a Section 110 investigation.

4. **Preliminary Inquiries:** A preliminary inquiry is a fact-finding process, authorized by the District Manager, to determine whether there is sufficient cause to recommend initiation of a Section 110 special investigation. The supervisory special investigator and District Manager will author a memorandum to the files, to indicate specifically what factors caused the District Manager to authorize a preliminary inquiry, rather than initiation of a special investigation.

   A preliminary inquiry may include interviews of those persons necessary to make a recommendation to the District Manager. External contacts will not normally exceed three. Special investigators shall adhere to standard identification and notification procedures as outlined in Chapter V of this Handbook.

   The special investigator assigned has 21 calendar days from when he/she begins work on the file, to complete the preliminary inquiry. The Investigation Assignment Control Form (Exhibit 7-3) shall be utilized to document when the preliminary inquiry was initiated and completed and the event number. A memorandum report to the supervisory special investigator and District Manager will outline contacts made (including statements as exhibits, if taken), and the recommendations of the special investigator.

   The supervisory special investigator and District Manager shall review the special investigator's memorandum report and determine whether to initiate a special investigation or that no further action is required. If a special investigation is authorized, it shall be conducted in accordance with Section 4.C of this Handbook. If no further action is warranted, the supervisory special investigator and District Manager shall author a memorandum to the file specifying reasons for closing the matter. A copy of the memorandum shall also be forwarded to the appropriate national headquarters office.

All information gathered relative to preliminary inquiries will be considered confidential, pre-decisional information and not generally releasable under FOIA. Documentation shall be maintained by the supervisory special investigator as specified in the MSHA Program Policy Manual.

5. **Investigations of Mine Accidents and Fatalities:** A special investigator, or a person who has received special investigative training, may accompany all fatal accident investigation teams. The investigator's duties will be to observe all pertinent conditions and monitor all statements to determine if a possible Section 110 violation may have occurred and if a special investigation should be recommended. In the event that a Section 110 violation does appear likely, the special investigator's participation in the accident investigation shall be terminated.

   If, during the course of the accident investigation, the special investigator believes that a Section 110 violation may have occurred, the following actions shall be taken:

   Inform the accident investigation team leader at the earliest possible moment that a possible Section 110 violation exists.

   Advise the accident investigation team leader of the requirements for the preservation of evidence. (See Chapter VI of this Handbook.)

   Notify the supervisory special investigator as soon as possible that a possible Section 110 violation may have occurred.

   The supervisory special investigator shall notify the District Manager. With concurrence of the District Manager, the supervisory special investigator shall initiate a separate investigation in accordance with Chapter IV, Section C, "Initiating Section 110 Investigations".

6. **Special Procedures Relative to Mine Disasters:** Representative(s) from the headquarters special investigations office (a "Chief Investigator" and/or "Custodian of Evidence") may be dispatched to the site of all mine disasters, and certain other accidents when specifically requested by the Administrator. Their activities will not interfere with the rescue and

recovery operation. These individuals will have the following technical responsibilities:

Advise the MSHA official in charge at the site concerning technical compliance matters that may bear upon the issuance of 103(j) or (k) Orders of Withdrawal, obtaining warrants, etc.

Sole responsibility for the collection and preservation of evidence and for maintaining the "chain of custody." Other MSHA officials at the site may identify evidence which they believe should be secured.

Compilation and maintenance of an administrative file of the disaster or accident. Among other things, they will collect daily copies of all notes made by MSHA officials and shall be included in any debriefing or interview sessions.

In order that the accident investigation will ensure that both prosecutorial and due process requirements are met, responsibility for planning the investigation shall be jointly shared by the Chief Investigator and the accident investigation team leader.

7. **Establishing Jurisdiction:** One of the most important elements in any investigation is to establish that the operation falls under the jurisdiction of the Federal Mine Safety and Health Act of 1977. To establish jurisdiction, there must be documentation to prove that the operation is a mine as defined by the Act and that the mine's products enter commerce or that the operations of the mine or its products affect commerce. If there is uncertainty regarding jurisdiction, the agency representative must gather all related information and relay it to the district manager. If uncertainty remains, the district manager should consult with the administrator and the office of solicitor. Once jurisdiction has been established, the case may proceed.

Some typical questions used to establish jurisdiction are listed below:

To whom is the product sold?

Where is the product shipped?

What equipment is used?
a. Where was it purchased?
b. Where was it manufactured?

Are blasting materials used?
a. What type of blasting materials?
b. Where purchased?
c. Where manufactured?

How is the product moved for sale?
a. Rail
b. Truck
    1) What make?
    2) Where purchased?
    3) Where manufactured?
    4) Who owns it?

Who <u>insures</u> the operators' equipment and vehicles?

Who provides telephone service?
a. Do they conduct interstate calls?

What is the source of their electric power?

Exhibit 4-1

Levels of Enforcement Chart

U.S. Department of Labor
Mine Safety and Health Administration

Jurisdiction — Products of Mine Enter or Affect Commerce

Working Against Orders

104(a) Type I Citation

314(a) Notice to Provide Safeguard

103(j) & (k) Order

Corporation Violation

104(d) Citation Mandatory Health or Safety Standard

Agent or Operator

Any Operator Who Willfully Violates

104(b) Order Failure to Abate

Operator Failure to Comply

Violate H&S Standard

No Imminent Danger

S&S

104(d) (1) Citation/ Unwarrantable

Aggravated conduct constituting more than ordinary negligence.

Violate H&S Standard

No Imminent Danger

S&S

104(d) (1) 104(d) (2) Order Unwarrantable

Aggravated conduct constituting more than ordinary negligence.

104(e) (1) 104(e) (2) Order Pattern

Operator Knew

Operator or Agent Knew Standard Violated

107(a) Order Imminent Danger

Refused to Comply

"Willful" – Evidence beyond Reasonable Doubt (Subject to Criminal Prosecution)

"Strict Construction"

The failure to comply with a mandatory health or safety standard is "willful" if done knowingly and purposely by a mine operator, or agent of a corporate operator who, having a free will or choice, either intentionally disobeys the standard or recklessly disregards its requirements.

"Knowingly" – Civil – Requires Preponderance of Evidence

The term "knowingly," as used in the Act does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law where it means knowing or having to reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence. Section 110(c): Agent of operator authorized, ordered, or carried out violation – must be of corporation.

Willful

Knowing

Unwarrantable

Citations

Type I

Exhibit 4-2

POSSIBLE KNOWING/WILLFUL VIOLATION REVIEW FORM
(Confidential, Pre-decisional Information)

U.S. Department of Labor
Mine Safety and Health Administration

MINE ID _____ MSHA OFFICE _____

MINE NAME _____

COMPANY NAME _____

VIOLATION INFORMATION: (Refer to Program Policy Manual, Volume I, Sec. 110)
Citation/Order No. _____ Date _____

ACCIDENT INFORMATION:
Was this violation associated with an accident which caused an injury? Yes __ No __ If yes: Fatal? ____ Non-fatal? ____

REVIEW CRITERIA: (Attach supplemental information if needed.)
1. Was there a violation of a mandatory health or safety standard, or order issued under the Mine Act? Yes __ No __
   Was it properly cited? Yes __ No __

2. Did the condition or practice cited create the presence of a high degree of risk to the health and/or safety of miners? Yes __ No __
   a) Who was exposed to the hazard? (Name and occupation)
   _____
   b) How were they exposed to the hazard? _____
   _____
   c) When and over what period of time did the exposure occur? _____
   _____
   d) Is this first hand information? Yes __ No __
   If not, who provided the information? (Name and occupation) _____

3. Did the operator or agent have apparent or actual knowledge, or reason to know, of the facts or conditions constituting the violation? Yes __ No __
   a) Who had this knowledge? (Name and title) _____
   b) How was this knowledge evidenced? _____
   _____
   c) Is this first hand information? Yes __ No __
   If not, who provided the information? (Name and occupation) _____

4. Any other pertinent information: _____
   _____
   _____

INSPECTOR'S CONCLUSION:
Based on this review, does this appear to be a possible knowing and/or willful violation of the Act or mandatory health or safety standard? Yes ___ No ___
Inspector AR Number: _____ Signature: _____ Date: _____

Supervisor: Do you agree with the inspector's conclusion? Yes ___ No ___
Signature: _____ Date: _____

POSSIBLE RECOMMENDED ACTIONS:
A. Conduct a special investigation. B. Conduct a preliminary inquiry. C. No further action.

Subdistrict/Assistant District Manager: Recommendation:____ (A, B or C from the list above.)
Signature: _____ Date: _____

Supervisory Special Investigator: Recommendation:____ (A, B, or C from the list above.)
Signature: _____ Date: _____

District Manager: Action Decision:___ (A, B, or C from the list above.)
Signature: _____ Date: _____

ADDITIONAL COMMENTS OR REMARKS: _____
_____
_____

CASE ASSIGNMENT INFORMATION:
Preliminary Inquiry No._____ Date Assigned _____
Investigation Case No._____ Date Assigned _____
Investigator Assigned _____ ID No. _____

MSHA Form No. 7000-20, Jan 89 White: Special Investigator Pink: HQ SI Office Yellow: SI Case Files
04-01-89 (Release 1)

Exhibit 4-3

CITATION/ORDER - 110 CASE DOCUMENTATION LOG

Citation/ Order No.	Issue Date	CFR Standard	Type Action	Mine I.D.	Date Received	P.I. No.	Date Assigned	110 Case No.	Date Assigned	Investigator Name	Due Date	Date Report Mailed	Case Status

CHAPTER V - INTERVIEWING

A. INTRODUCTION

The spoken word is potentially the greatest of all sources of investigative evidence. No investigation is complete until every important witness has been interviewed. Proficiency in interviewing will assure a high degree of reliability in the results achieved and will help prevent surprise testimony from arising later. Exhibit 5-1 is a suggested outline of the steps to be taken when conducting an interview.

All persons having information relevant to the case should be interviewed and statements taken, if possible. If interviews are not conducted or statements not taken, information obtained shall be documented in the case file. Under certain circumstances, a witness may be interviewed more than once.

B. PREPARING FOR THE INTERVIEW

Investigators will conduct interviews in a professional manner, without making any threats or promises whatsoever to elicit information. Since questions are the tools of the interviewer, it is essential that questions be clear, communicative and designed to elicit information.

Successful interviewing is a skill that must be developed through specialized training and experience.

1. Location: Statements should be taken separately from each person. In those unusual circumstances where joint statements are taken, and an interviewee desires to give a statement to the MSHA representative in private, it will be permitted. Generally, the investigator should attempt to control the physical conditions where an interview will take place. It is desirable to interview in a location that is private. Witnesses may be interviewed in their homes if there are no disturbing noises or interfering situations present. Witnesses should be interviewed on a prearranged schedule, whenever possible, by appointment at a specific time and place. If a witness is no longer employed by the company being investigated, contact through the new employer should be avoided if possible, or made in a manner to avoid the impression that the new employer is the subject of investigation.

2. Participation of Attorneys: Investigators will offer no objections to the presence of an attorney, or other representatives during the interview of a witness, if the witness requests or insists on such presence. Keep in mind that in an interview of a witness represented by counsel, the

attorney may likewise represent another party of the investigation. It should be emphasized that under these circumstances, investigators will exercise caution to avoid disclosure of MSHA's case information. Similarly, in interviews conducted in the presence of attorneys, or other representatives, investigators will not engage in arguments as to interpretations of the law, the facts of the case, or matters of procedure. Interviews, where the attorney or other representatives seek to take charge and control the scope and progress of the investigation, will be courteously discontinued. Attorneys or other representatives may advise their clients, but may not reply for them. When an interview is discontinued under the above circumstances, the investigator will make note of the fact, and include it in the investigation report.

C. PLANNING THE INTERVIEW

1. General: Establish a goal and prepare a plan or an outline before questioning the witness. Determine the requirements of the law or the particular investigative assignment. For Section 110 investigations, the requirements are determined by analyzing the section of the law involved and identifying the elements that must be investigated. For other investigations, carefully analyze the issues and identify the matters to be explored. When you don't understand the issue of law, check with an attorney from the Office of the Solicitor. Do not try to interpret the law yourself.

   When you have decided on the probable relationship of an individual to your investigation, you are in a position to determine what details are likely to be known. Each "unknown" is in effect a question to be answered. Therefore, you should outline the "unknown" points in logical order. Be sure to include several points of a general nature to ascertain if the witness has knowledge on unanticipated matters.

   The outline should cover every topic to be discussed. As a rule, the items outlined will indicate the issue to be resolved, but will not specifically cover the individual questions that must be asked. During the discussion of an "unknown," it may be necessary to ask a number of related questions before the matter is resolved or explored satisfactorily. The specific topic question may never be asked at all.

2. Establishing the Order of the Interviews: Generally, witnesses who can and will voluntarily give the most complete account of the event and associated background information should be interviewed first. This will give

an early overall picture of the matter and provide information of value in interviewing the other witnesses. It is advantageous to corroborate the statement of a witness with statements obtained from other witnesses.

3. Conducting the Interview:

a. Important Considerations.

Witnesses will cooperate much more readily if they are aware of the investigator's authority to interview them. Present your credentials to establish your authority prior to conducting the interview.

Every person who is interviewed must be advised that his/her statement will be kept confidential by the Department of Labor to the extent provided by law. During formal and informal dealings with others, great care should be taken not to reveal, either directly or indirectly, persons who have given statements and/or the nature of the statements. Only the person interviewed shall be offered a copy of his/her statement. It shall be the responsibility of the special investigator to maintain the security and confidentiality of the statements obtained by MSHA.

Never argue with a witness. Start off with easy questions that are readily answered and positive in nature. This approach will convey the impression that the witness desires to cooperate. Do not ask questions directly related to the matter under investigation until it appears that the witness will respond to such questions.

If, during the interview, there are signs that the witness is becoming unwilling to talk, you should revert the conversation to topics discussed freely; then again progress slowly to the desired topic by a different line of questioning.

Use every precaution to avoid false rumors, embarrassment, or character defamation. It should be kept in mind that even the recognized presence of an MSHA investigator may cause speculation.

Assure that the information comes from the witness and is not suggested by leading questions.

Keep in mind that potentially friendly and cooperative witnesses still may not give desired information because:

They have faulty perception.

They do not remember.

The question was not properly asked.

They are not aware that they possess worthwhile information.

They are reluctant to get involved.

They are reluctant to involve others.

They are not impressed with the importance of cooperating.

They do not feel friendly toward the investigator or the agency.

They dislike the possible inconvenience of appearing in court.

The time or place of interview may interfere.

They are unknowingly prejudiced.

Their logic or conclusions are faulty.

They mistake inferences, rumors, or hearsay for facts.

b. Establishing Rapport:

Attempt to establish a sincere and trusting attitude with the witness to enlist full cooperation. Some procedures for establishing rapport are:

Establish confidence and trust by having a friendly discussion at the start of the interview.

Don't begin the interview, if possible, until the witness appears friendly and cooperative.

Keep conversation informal and easy.

Display pleasant emotional responses and avoid unpleasant expressions.

Urge the witness but never hurry or pressure him/her.

Be interested and sympathetic to the witness's problems.

Don't ask questions that insinuate suspicion of the witness, either by composition or method of asking.

Try to reestablish rapport at any time during the questioning when the witness appears to become reserved or hostile.

Avoid labor-management discussions that appear to put MSHA in the position of advisor.

c. The Questions:

As a general rule, start an interview by asking the witness to give a free narrative discussion of what is known about the matter being investigated or about certain specific "unknown details". All "unknown detail" items that have not been satisfactorily covered by the free narrative discussion should be explored by direct examination. Each "unknown" should be explored separately and completed before proceeding to the next. It will generally be necessary to use a sequence of questions and discussions which should proceed from "general to specific". Each question should be precise. Be sure the witness understands the questions. Efforts should always be made to test or reconfirm the information given by a questionable witness. An informal cross-examination may be useful to test the completeness or accuracy of the testimony. Avoid merely trying to get the witness to confirm the information of a previous witness. Obtain the information independently and determine if it does or does not corroborate prior information attained. If a witness claims no knowledge, ask a number of other questions about the matter. The witness will often unintentionally reveal the information.

When the withholding of information is suspected, rephrase and continue to explore until you get precise answers on every doubtful point. Some indications that a witness has more information are:

Attempts to evade questions.

Vague answers.

Conflicting information with previous statements.

Physical actions and appearance of the witness.

Information from other sources indicating the witness has certain knowledge.

Circumstances placing the witness in a position to know certain information.

d. Testing Assertions for Truthfulness:

To test the assertions of a witness, evaluate the conditions under which the information was obtained. First, determine how the information was obtained. For example, if acquired visually, what was the condition of the light? What distance was involved?

Similar questions should be considered when other senses or body functions are involved. If the information was related to the witness by someone else, how did the third party get it? How reliable is the word of the third party and what were the circumstances under which it was related? Was it possibly obtained from joking or gossiping? If the information was deduced from circumstances, what facts were the deductions based on?

Determine the degree or contact a witness has had with other witnesses, subjects and occurrences.

e. Verifying the Information:

After the various phases of the interview are finished, recheck to ensure that all of the "unknown details" on the interview outline have been satisfactorily explored, and that the reliability of the information obtained has been tested.

Next, mentally rearrange the information obtained so that the details follow one another in logical continuity. Summarize the testimony for the witness by stating all important details in proper sequence. Stop after each segment of the summary and ask the witness to verify the correctness of your interpretation. If the witness disagrees, correct the discrepancy before proceeding.

f. Conclusions:

Do not draw conclusions until you have exhausted all possible sources of information. Be careful not to base reasoning on false assumptions. In the initial evaluation, be skeptical of so-called "facts" until you are satisfied with their authenticity. Even after you are satisfied with the facts, use care in interpreting them.

D. TYPES OF QUESTIONS

1. Extended-Answer Questions: Some questions should be framed to require a narrative answer. Questions that can be answered by a "yes" or "no" restrict the information that the witness may be inclined to give. Obviously, answers to these "yes" and "no" questions usually do not supply enough information. Such questions are acceptable when summarizing or verifying the statement with the witness.

2. Leading Questions: Leading or suggestive questions are those which:

   a. Suggest the desired answer;

   b. Assume something as fact which has not as yet been established as fact; or,

   c. Embody a fact and require a simple "yes" or "no" answer.

   When asking for original information, such leading questions should be avoided.

3. The Seven W's: The following seven questions are useful in most interviewing situations:

"What?"	(What happened?)
"When?"	(When did it happen?)
"Where?"	(Where did it happen?)
"Why?"	(Why did it happen?)
"How?"	(How did it happen, how much, how many?)
"Which?"	(Which one did it?)
"Who?"	(Who was involved?)

When complete answers to these seven elements are obtained, the issue being explored is usually satisfactorily resolved.

E. NOTE TAKING

1. **Introduction:** This section describes the legal support for, and the proper means of taking, preparing and preserving contemporaneous notes and written statements. With respect to any and all activities associated with the investigation of a case, investigators should continually bear in mind the importance of documenting the file to support the findings. The extra time spent carefully taking notes and writing memoranda to the file is considered productive time, since documenting activities can later save time, and perhaps the case, when memories fade and issues become unclear.

2. **Contemporaneous Notes:** Contemporaneous notes are the special investigator's documentation of all comments and observations related by the parties involved and recorded as these events take place. These notes may include handwritten comments, daily reports, diaries, tape recordings, scrap paper, internal memoranda and other similar articles pertaining to the investigation.

   All of these documents must be retained even if they are later transcribed into official documents. An example of this would be interview notes taken at the time of the interview and later typed into a formal statement. Even though all the information contained in the notes is subsequently included in the formal typed statement, the original handwritten notes must be retained in the case file.

3. **Legal Support:** The legal support for the Agency's retention procedure of contemporaneous notes is based in the "Rules of Criminal Procedures for the United States District Courts". Rule 16 states in part:

   > upon request of the defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant . . . (or) the substance of any oral statements which the government intends to offer in evidence.

4. **Format:** There is no specific form for the taking of notes required during any special investigation. Exhibit 5-2 illustrates a format which may be used. However, contemporaneous notes must be written in a manner so that they may be interpreted and understood by an individual who is not familiar with the investigation.

5. Content: Investigative notes, such as those taken during an interview, should contain elements of the exact words of the witness. It is important that exact words be used so that the investigator may preserve the original intent of the witness. In addition, investigative notes should contain the following elements:

Subject of notes (either person or incident).

Date notes were made.

Place notes were made.

Investigator's signature or initials.

Reference case number.

If a second investigator is present, both should prepare their own notes, or sign or initial the notes of the original investigator.

F. STATEMENTS

1. Introduction: The principle purpose of the interview statement is to obtain all of the information a witness has which will be helpful in resolving the case. Therefore, it is necessary to prepare a permanent record of every interview to be preserved for future use. Every record of an interview shall be carefully reviewed for any typographical errors and for accuracy of context. When the statement is examined by the witness, he/she may be permitted to correct typographical errors or make minor modifications to the testimony. These corrections and/or modifications should be initialed by the witness. The witness may provide additional information modifying or clarifying the original statements.

2. Use of Statements: The interview statement may be used to refresh the memory of a witness during a trial or an administrative hearing. It may also be used to impeach a witness on the stand when his/her previous statement is inconsistent with current testimony, or to furnish a basis for prosecution of a witness who testifies at the trial. If the statement constitutes a confession or an admission, the pertinent parts may be submitted as evidence during the trial.

3. Signatures of Witnesses: Reference is made in various sections of the Handbook to obtaining signatures on statements. While this is desirable, it is in some

cases impractical or not possible. An investigator should not delay submission of an otherwise completed investigation to engage in repeated attempts to acquire signatures.

4. Types of Statements:

a. Question and Answer.

The "question and answer" statement is a record of the questions asked by the investigator and answers given by the witness. The investigator may take handwritten notes on what the witness says, or a tape recorder may be used with the expressed advance consent of the witness. Tape recorded interviews are preferred when conducting Section 110 investigations. Each question shall be consecutively numbered. In addition, the statement should contain the following information:

Date, time and place where the statement is given.

Name, home address, home telephone number, date of birth and Social Security Number of witness.

Case number to which the statement pertains.

Name and title of the investigator.

Names and titles of all other persons present at the interview; also the reason for each person being present, if not self-evident.

Purpose of the interview without disclosing details of MSHA's case information.

That the statement was made freely and voluntarily, without duress and that no promises or commitments were made by the investigator.

A statement offering the witness to make any other remarks for the record.

A statement telling the witness that he/she will have an opportunity to examine and to sign his/her official statement.

Off-record discussions should be discouraged during a tape recorded interview.

Several advantages to the "question and answer" type of statements are:

The statement is taken in the same manner as testimony taken during a trial or administrative hearing.

The statement is clear and to the point.

It is difficult to dispute with claims of misunderstanding.

b. Unsworn statements.

An unsworn statement (i.e. Exhibit 5-4) is not taken under oath but is a written declaration of fact which is signed and dated by the witness. The statement should indicate that the witness read it or that it was read to him/her and that it was understood. If the witness refuses to sign the statement, the investigator should suggest that the witness initial each page of the statement. If initialing is also refused, the investigator should ask if the witness is certain that the statement is truthful. A notation of the witness's reluctance to sign or initial the statement should be made on the last page of the statement.

c. Memorandum of Interview.

A "memorandum of interview" is an informal note of something that the investigator desires to fix in memory by the aid of written record. It is a record of what occurred at the interview and may be in the format shown in Exhibit 5-5. The memorandum should contain all relevant information concerning the matter at hand. It should be promptly signed and dated by the investigator.

G. **TRANSCRIBING TAPED INTERVIEWS:**

The special investigator is not permitted to transcribe taped interviews in his/her handwriting. This will only be accomplished by a clerk using transcribing equipment which results in typed verbatim copies of the transcript of the interview.

Exhibit 5-3 is an example format for a question and answer statement.

Exhibit 5-1

INTERVIEW OUTLINE

I. INTRODUCTION

A. Interview:

Definition: An interview is the questioning of a person who is believed to possess knowledge that is of official interest to the investigator. The effectiveness of an investigation is largely dependent upon his/her ability to obtain information from complainants, witnesses, informants and suspects.

B. Interviewing is an art and science which is developed through practice.

C. Important:

1. The greater part of an investigation is usually devoted to interviews.

2. In most cases, interviews are the only source of information.

II. PRE-INTERVIEW

A. Questions to be answered:

1. What was the incident?

2. Where was the incident?

3. When did the incident occur?

4. What was known prior to the incident?

5. Who was involved?

6. What was the intent of those involved in the incident?

7. How did it happen?

B. Gather background information for interview:

1. Records:

a. Reports:

(1) Accident reports related to mine.

(2) Investigation reports related to parties involved.

b. Citations issued to mine or parties involved

2. Determine objective of the interview: What is to be accomplished?

3. Establish place of interview:

The investigator should, as a general rule, select a place which will be conducive to a productive interview.

(a) Interview should be arranged carefully.

(b) Privacy is a must.

4. Date and time of interview:

a. The interview should take place as soon as possible after the event.

b. Subject still has information fresh in mind.

c. Subject doesn't have time to think of the consequences of giving information, such as: time he/she may have to spend in court, loss of money due to time in court, and to the fact he/she will have to testify in court.

5. Dress for the occasion.

III. INTERVIEW

A. Establish rapport with interviewee:

1. Introduce and identify self.

2. The relationship existing between the interviewer and the subject usually determines the success of the investigation.

3. The interviewer must endeavor to win the confidence of the subject whenever possible, since a completely voluntary offer of information is the ideal result of an interview.

4. Attitudes:

   a. Person conducting interview.

   b. Individual being interviewed.

B. Questioning (know what and when to ask):

1. After witness has told story, the investigator should review it with him/her and request him/her to amplify certain parts.

2. Guiding the conversation (keep witness from rambling while giving information).

3. Corroborating (information obtained from one witness should be corroborated with that obtained from others).

4. Inaccuracies (questionable points should be treated repeatedly by recording queries and additional questions).

5. Technique of questioning:

   Questions should not be asked until the person appears prepared to give the desired information in an accurate fashion.

   a. One question at a time.

   b. Avoiding the implied answer.

   c. Simplicity of questions.

   d. Saving face.

   e. "Yes" and "no" questions.

   f. Positive attitude.

   g. Dominating the interview.

6. Techniques for controlling digression:

   a. Precise questioning:

      The question should be constructed as precisely as possible in order to redirect the range of information which the subject can give.

b. Shunting:

This technique consists of asking a question which relates the digression to the original line of questioning.

7. Special techniques:

a. Physiological characters of person being interviewed (Non-verbal communications):

(1) Sweating.

(2) Color changes.

(3) Dry mouth.

(4) Pulse.

(5) Breathing.

(6) Nervousness.

(7) Evasive facial expressions.

(8) Embarrassment.

8. Recording statement:

a. Written:

(1) The investigator should not take out his/her notebook at the beginning of an interview:

(a) Listen to subject's story first without taking notes.

(b) Request permission to take notes at the conclusion of the interview.

(c) Prepare notes in forms of statement and obtain witness' signature.

b. Tape recorded:

(1) Obtain permission before using a tape recorder.

(a) If permission not given, make notes of conversation immediately following interview.

c. Have statements signed or notarized if possible.

IV. POST INTERVIEW

A. Review information received.

B. Re-interview if necessary.

C. Prepare report.

Exhibit 5-2

EXAMPLE FORMAT FOR INVESTIGATIVE NOTES

July 2, 1988 2:10 pm Case: DENV-CD-88-15

Place: Federal Building, Room 222
Pine Avenue, Denver, Colorado

Present: Sam Doe, Witness
(SSN: 123-45-6789; DOB: 09-13-54)
Peter Smythe, Attorney for Sam Doe
John P. Jones, Special Investigator

Doe stated that he is married and lives at 201 South Street, Springfield, Colorado. Doe stated that ... he and Phil Black were preparing to roof bait a place ...

Doe made the statement: "Bill Smith put the temporary supports in the 001 section ..."

John P. Jones
Investigator

Exhibit 5-3

EXAMPLE FORMAT FOR QUESTION AND ANSWER STATEMENT

Interview statement of John J. Jones at his residence, 115 South Street, Cumberland, Maryland 77033 (301/555-1212) at 9:30 a.m., on Tuesday, September 6, 1988, concerning . . .

Persons present during interview:

John J. Jones, Witness (SSN# and Date of Birth)
Adam Adams, Attorney
Dave Smith, Special Investigator

(Questions were asked by Dave Smith, Special Investigator, and answers were given by Mr. Jones, unless otherwise specified.)

1. Q. Mr. Jones, you were requested to answer questions concerning . . . Do you fully understand this? (If the witness requests clarification either as to his/her rights or the purpose of the investigation, the investigator will give such explanation as is necessary to clarify the matter.)

2. Q. Mr. Jones, do I have your permission to tape record this interview?

NOTE: After the questioning is concluded, the interview is closed with the following questions:

43.Q. Mr. Jones, is there anything that you expected me to ask, that I did not ask?

A. (Witness may say "no" or offer information).

44.Q. Do you have any questions or comments?

A. (Witness may say "no" or ask question or comment).

45.Q. Have I, or has any other MSHA investigator, threatened or intimidated you in any manner?

A. No.

46.Q. Have I, or has any other MSHA investigator, offered you any rewards, or promises of reward, in return for this statement?

A. No.

47.Q. Have you given this statement freely and voluntarily?

A. Yes.

48.Q. Is there anything further you care to add for the record?

A. No.

49. If this statement is transcribed, you will be given an opportunity to read it, correct any typographical errors, and sign it.

I have read and have had an opportunity to correct this statement consisting of _____ pages. I hereby certify that the foregoing answers to the questions asked by Dave Smith, Special Investigator, are true and correct. I have initialed each page of the statement.

I understand that my identity and any information contained in this statement which might lead to a disclosure of my identity, will be held in confidence by the U.S. Government and will not be disclosed as long as the case remains open, unless and until the Government requires my presence as a witness in any legal proceeding. After the case is closed, my identity and the information contained in this statement will be held in confidence to the extent provided by law.

_____
(Signature)

_____ Day of _____
(Month/Year)

_____ _____
(Witness) (Investigator)

Exhibit 5-4

STATEMENT

I, _____reside at

_____in the city of
(number) (street)

_____, county of _____

State of _____, Zip Code _____.

My telephone number is (area code/phone number) (___)_____.

I (was) (am) employed by _____,

located at _____.
(number) (street) (city) (state) (zip code)

Office telephone (area code/phone number) (____)_____.

My employment at this location consists of approximately

_____ beginning on _____
(years) (months)

19____. My job classification (was) (is) _____

_____.

I understand that this statement will be held in confidence by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the statement in a formal proceeding. After the case is closed, the information will be held in confidence to the extent provided by law.

Interview is started at: _____(Date/Time).

Date of birth:_____ SSN: _____-_____-_____

Present during interview: _____

_____

_____

Page 1 of _____ _____(Initial and Date)

STATEMENT OF_____(Continued)

Page _____ of _____ _____(Initial and Date)

Exhibit 5-4

STATEMENT OF _____ (Continued)

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

I have read (or have had read to me) and had an opportunity to correct this statement consisting of _____ pages. I find these facts to be true, accurate and correct to the best of my knowledge and belief. It was made voluntarily and I have initialed or signed each of the foregoing pages and affixed my signature to the last page No. _____.

_____
(Signature of Interviewee)

_____ Day of _____
(Month/Year)

_____ _____
(Witness) (Investigator)

Exhibit 5-5

EXAMPLE OF MEMORANDUM OF INTERVIEW

Case Number: _____

Date and time of interview: Thursday, September 29, 1988
_____ a.m. to _____ p.m.

Name and address of Interviewee:
(Obtain SSN# and Date of Birth, if possible)

Place: Location of interview

Present: _____ (Interviewee)

_____ (Attorney)

_____ (Others present)

Interview conducted by MSHA Investigator_____

Body of Memo: (All pertinent information relating to the interview should be in the memorandum in some logical, manner, either in order of topics discussed or of importance, chronologically or in any other appropriate order.)

I (prepared) dictated this memorandum on _____, 19__, after refreshing my memory from notes made during and immediately after the interview.

_____
Investigator

I verify that this memorandum has recorded in it a summary of all pertinent matters discussed with the interviewee on _____, 19__.

_____
Investigator

CHAPTER VI - EVIDENCE

A. INTRODUCTION

Absent a search warrant, MSHA special investigators have no authority to seize evidence that is not voluntarily released. If a piece of evidence is not voluntarily released, a search and seizure warrant may be obtained from a U.S. Magistrate. When such a warrant is needed, the special investigator shall brief the supervisory special investigator on the reasons for the warrant. If the supervisory special investigator agrees that a warrant is needed, the headquarters office shall be notified of the request. After consultation with the Office of the Solicitor, the headquarters special investigations office will authorize or deny the request for action.

Every piece of evidence that could have any connection with the case should be collected. Nothing should be rejected because it appears too big, too small or insignificant. Objects or material that may seem insignificant at the time of discovery may later prove to be valuable evidence. Any physical evidence taken into custody must be connected to the location from which it was taken through the use of photographs, sketches, or oral or written testimony. The photographs of the evidence must be carefully documented by recording the following information:

Names of persons present when photograph was taken.
Type of camera.
Type of lens.
The shutter speed.
The diaphragm opening.
Kind of film used.
Time of day.
Degree of light and whether natural or artificial.
Details of processing.
Chain of custody of negative and prints.

B. NATURE AND KINDS OF EVIDENCE

1. Forms of Evidence: There are three forms of evidence: real, documentary, and testimonial. They are defined as follows:

   a. Real (Physical) Evidence: Tangible objects (e.g., roof bolts, equipment, cables, etc.) presented for inspection to the trier of fact, "speaks for itself." It is usually the most trustworthy type of evidence, and, accordingly, policy factors favor its admissibility.

   b. Documentary Evidence: It consists of a writing (e.g., roof control plan, deed, contract, etc.), rather than a tangible object.

c. Testimonial Evidence: Oral testimony is given in court (or by deposition) by a witness and may be either factual or opinion testimony. Interview statements in which the witness refers to what other individuals told him/her are of limited value. These may serve to indicate others whom the investigator may attempt to interview, but have limited evidentiary value. Problems involving admissibility of such evidence are the concern of the attorney working on the case.

If an operator, or any director, officer or agent of a corporate operator, in discussions with an investigator, makes any admission with respect to civil or criminal violations, such admission may be introduced into evidence at a trial. If admissions are obtained, diary entries or memoranda to the file covering the details should be made as soon as possible after the conversation. A permanent record will then be available from which the investigator can refresh his/her recollection, if called upon to testify at a trial.

2. Types of Evidence: There are three types of evidence which the special investigator may be required to collect:

a. Direct Evidence: Proves the fact in issue directly; i.e., without any inference or presumption. The sole determination which must be made is whether the evidence is true.

Example: W testifies: "I saw D strike P." This testimony establishes the fact of striking, provided the trier of fact (i.e., Administrative Law Judge) believes the witness.

b. Circumstantial Evidence: Proves the fact in issue only indirectly; i.e., by proving another fact from which an inference or presumption may arise as to the fact in issue. Here, the trier of fact is required to weigh probabilities as to matters other than merely the truthfulness of the witness.

Example: W testifies: "I heard D admit that he struck P." Such testimony does not in itself establish the fact of striking, but merely that D made an admission, from which an inference of the striking may be drawn. The trier of fact must weigh the probabilities as to whether or not D was speaking the truth when he made the claimed admission, as well as determining whether W is telling the truth.

c. Cumulative Evidence: Additional evidence to which there is already direct or circumstantial evidence; i.e., evidence which merely repeats or verifies other evidence.

C. CUSTODY OF EVIDENCE

If a Section 110 investigation is conducted, special procedures are required for the custody, or the collection and preservation, of the evidence. This section describes these procedures. The attorney assigned to the case or the special investigations headquarters office will be available to provide additional assistance if needed.

A Master Log of all physical evidence taken into custody shall be maintained by the custodian of the evidence (usually the special investigator). This ensures that each item of evidence can be accounted for and positively identified from the time it is taken into custody until it is presented at trial or the case is closed. The Master Log should consist of a stiff-backed bound, ledger-type book having numbered pages with no pages missing. No erasures are permitted. This log is kept to record all the items of evidence which were collected. Its purpose is to show that the evidence was properly handled, to ensure that it is in the same condition as found and was not tampered with or altered.

1. Identification: All physical evidence obtained must have an Evidence Identification Tag (see Exhibit 6-1) attached and be marked by the person taking it into custody so that it can later be positively identified. However, in those instances where large numbers of a similar item of evidence is collected, it is necessary to tag and mark only a representative number of samples of the similar items.

   The identification markings must be permanent in nature, and care must be taken not to cover up, deface, alter or in any way destroy the items. The markings may be the person's initials or any unique symbol which can be positively identified by the person. However, an "X", or other such common symbol, should not be used. The investigator's notes should reference the identification markings used, the date, time and specific location where the object was found, and any additional information necessary to distinguish each item from other evidence collected.

   There are times when it is necessary to release a piece of evidence, i.e., pursuant to a subpoena. In order to maintain the chain of custody of the object, the investigator shall give the individual a signed, itemized receipt (see Exhibit 6-2), for each piece of evidence released. A copy of the receipt will be retained for the case file. When the evidence is returned, the investigator shall obtain the original receipt and have the person acknowledge in writing that the evidence was returned.

A piece of evidence may be excluded from exhibit in court if the chain of custody has not been maintained or if it has been improperly handled so that it is no longer in its original condition.

2. Joint Custody: When the evidence consists of small items, it may be secured in the local MSHA office. However, if large amounts and/or large items are collected, it may be necessary to secure these items in a storage area at the mine site. When this is necessary, "joint custody" is shared by the MSHA custodian and the owner of the evidence. The evidence must be secured in such a manner that both parties (the custodian and the owner) would have to be present to unlock the secured area and have access to the evidence. (For example, two separate locks and each party having only one key to their lock.) The evidence shall not be removed or transferred from the secured area without the written consent of all parties on the Chain of Custody Form (Exhibit 6-3). Then, the only purpose for the transfer would be for examination, analysis, or use in a hearing or trial. When such a transfer occurs, an original and one copy of the Chain of Custody Form shall be completed.

3. Preservation of Evidence: All evidence shall be carefully stored under lock and key under the direct control of the MSHA investigator having custody. All information concerning the evidence received or removed shall be recorded in the Master Log. The originals, certified copies or photocopies of documents will be preserved as received and filed for evidentiary purposes. These directions are not intended to restrict laboratory examination of original documentary evidence.

   Certain types of evidence may have to be submitted to a laboratory for analysis, such as gas, air or dust samples. To ensure an accurate analysis, the evidence must be received in the same condition as when it was originally collected. It may be appropriate to send along a "standard sample of the evidence" for comparison purposes.

4. Transmission of Evidence: When evidence is transmitted from one place to another for the purposes of evaluation, laboratory analysis, expert opinion, etc., precautions must be taken to ensure that the evidence is not tampered with, altered, etc., and that the chain of custody is not broken. The evidence must be transmitted in person or by certified mail. Large items which cannot be mailed or carried will require that special arrangements be made by the supervisory special investigator or other appropriate official. The

following procedures must be followed when transmitting evidence. These procedures are not intended to be all inclusive, and additional procedures should be considered for every circumstance.

a. Briefing the Recipient: The custodian of the evidence must brief the recipient (either in person, by memorandum, or both) on the actions he/she must take when the evidence is received and processed. The custodian shall suggest that the recipient pack the evidence as listed in Item 3 below when returning the evidence. The recipient should be told that he/she may have to testify in court as to the precise actions taken while the evidence was in his/her custody.

b. Complete Chain of Custody Form: This form (Exhibit 6 -3) is originally completed in duplicate by the custodian of evidence. Both copies will be packed with the evidence and transmitted to the recipient. Upon receipt of the evidence, the recipient will fill in the appropriate blocks on both copies of the Chain of Custody Form (date received, signature, name, title, and purpose of custody change). The original will always remain with the piece of evidence. The copy will be returned to the custodian. When the custodian receives this copy of the Chain of Custody Form, a notation will be made in the Master Evidence Log Book as to when and who received the piece of evidence and for what purpose. When the evidence is ready to be returned to the custodian, be sure that the evidence is packaged properly, transmitted as directed by the custodian, and any other measures which need to be taken to ensure that the chain of custody is not broken.

   When the custodian receives the returned evidence, it shall be so noted in the Master Log Book.

c. Pack the Evidence: Wrap the piece of evidence, the original and one copy of the Chain of Custody Form in paper, cloth or other appropriate covering material. Place in a box, envelope, etc., for transmittal. Seal the container with tape or wax. On the outside of this container, place the name, title and address of the person to receive the evidence and the return address of the custodian of evidence. Mark each side of the package with the words "Evidence - to be opened only by authorized personnel", or the equivalent. Give directions such as "Expedite", "Urgent", "Fragile", "Explosive", "Inflammable", "Perishable", or similar notation.

5. **Returning of Material Gathered as Evidence:** No items of evidence are to be finally returned to the owner, their agent or attorney, without the prior written approval of the appropriate MSHA Administrator. However, in the event of an ongoing criminal investigation involving the Department of Justice, evidence shall not be released without the written consent of both the Administrator and Justice.

D. CERTIFICATION OF DOCUMENTS

When copies of MSHA documents are submitted as evidence during a legal proceeding under Section 110 of the Act, they must be certified as being an authentic copy of the original document. MSHA Administrative Policy and Procedures Manual, Volume I - Organization, Chapter 349.6, Certification of Documents, (Exhibit 6-4) dated 7/1/88, provides the procedures for certifying and/or affixing an official seal to attest to the source of authenticity of official documents of the Mine Safety and Health Administration.

The Administrators and Deputy Administrators for Coal and Metal and Nonmetal Mine Safety and Health; the Chief, Office of Technical Compliance and Investigation, for Coal; the Chief, Division of Management and Investigations, for Metal and Nonmetal; and the District Managers are redelegated authority for the certification of documents.

The special investigator should coordinate his/her request to the District Manager for certification of documents through the supervisory special investigator.

Exhibit 6-1

Evidence Identification Tag

U.S. Department of Labor
Mine Safety and Health Administration

1. Unique Identifier

2. Date

3. Office Location

4. Exhibit Number

5. Description of Article

6. ☐ Taken From ☐ Received From

7. Received By (print or type name)

8. Signature

9. Witness

10. Special Instructions

MSHA Form 2000 181 (cover)

Evidence Identification (continued)

Date	Chain of Custody		Purpose of Custody Change
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	

Reverse MSHA Form 2000-181

Exhibit 6-2

Itemized Receipt

U.S. Department of Labor
Mine Safety and Health Administration

1. Submitted in Regard to	2. District Office
3. Received from	4. Place of Receipt / 5. Date Received
6. I acknowledge receipt of the following ◆	7. Page of

8. Received by (signature)	9. Address
10. Title	11. Telephone Number
12. Witness (signature)	13. Title

Acknowledgement of Return of Items (above documents were returned to me as indicated below)

14. Person Returning Documents	15. Place Returned
16. Date Returned	17. Signature of Person Receiving Returned Documents

Exhibit 6-3

Chain of Custody

U.S. Department of Labor
Mine Safety and Health Administration

1. Unique Identifier | 2. Date | 3. Office Location | 4. Exhibit Number

5. Description of Article

6. ☐ Taken From (person or location) ☐ Received From ☐ Found At

7. Received By (print or type) | 8. Signature | 9. Witness

10. Special Instructions

Date	Chain of Custody		Purpose of Custody Change
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	
	Relinquished By (signature)	Received By (signature)	
	Print Name and Title	Print Name and Title	

NOTE: Officials exercising this authority must assure that such correspondence does not: (1) violate existing policy, (2) make policy exceeding authority, (3) officially comment on, affect, or concern legislation or (4) commit MSHA in a manner contrary to existing policies and procedures, or compromise the Assistant Secretary.

Redelegation:

All first and second level officials. NOTE: The definition of first and second level officials can be found in Paragraph 304 of this manual chapter.

May be further redelegated.

Limitations: Correspondence with the President requires approval by the Assistant or Deputy Assistant Secretary, and is reserved for the signature of the Secretary of Labor.

Correspondence in response to Congressional inquiries is reserved for the signature of the Assistant or Deputy Assistant Secretary.

349.5 Testimony of Employees

Authority: Grant permission for officials and/or employees of MSHA to give testimony, pursuant to a subpoena issued by an administrative or judicial body, concerning business matters of the government or the contesting of official records (29 CFR, Subpart C, 2.20-2.25).

NOTE: This delegation does not apply to testimony or statements made during the normal course of MSHA business.

Reservation: Authority is reserved to the Solicitor's Office.

349.6 Certification of Documents

Authority: Authenticate and release correspondence, reports, publications, and other documents from the files of MSHA (memorandum from the Assistant Secretary for Administration and Management, March 13, 1978). The signing and issuing of certifications of authentication is under the seal of the Department of Labor (29 CFR, Section 70.68). In most instances, MSHA Form 1000-225, True Copy Record Certification, is to be used in certifying documents.

Redelegation:

Coal/Metal and Nonmetal	Administrators and Deputy Administrators; Chief, Office of Technical Compliance and Investigations; District Managers
Administration and Management	Director and Deputy Director; Chief, Management Services Division; Chief, Records Management Branch

May be further redelegated.

Special Redelegation: The Director, Office of Assessments, Chief, Division of Management Research are redelegated the authority to serve as Authentication Officers only in connection with the release and authentication of documents associated with the assessment and collection of penalty payments, respectively, assessed under Section 110, Federal Mine Safety and Health Act of 1977. This authority may be further redelegated.

349.7 Cooperative Programs

Authority: Approve agreements establishing cooperative programs with educational institutions, State governments, labor organizations, safety associations, mine operators and related industries for the purpose of promoting mine safety and health.

Reservation: Authority is reserved to the Assistant and Deputy Assistant Secretary.

CHAPTER VII - CASE FILES AND FINAL REPORTS

A. CASE FILES

1. Case Numbers: Case numbers shall be assigned as indicated in Exhibit 7-1 for Coal Mine Safety and Health or Exhibit 7-2 for Metal/Nonmetal Mine Safety and Health.

2. The Case File:

   a. Section 105(c): A case file will be established for all Section 105(c) cases by the complaint processor, which will consist of a file folder with a two-prong fastener on the top right side. The 2000-123 and -124 forms and notification letters to the complainant(s) and respondent(s) shall be inserted under the two-prong fastener. The Investigation Assignment Control Form 2000-158 (Exhibit 7-3) shall be stapled onto the left inside cover. Instructions for completion are outlined in Exhibit 7-4. When a discharge complaint is received, the complaint processor should indicate in large red letters on the outside cover of the file folder the word "DISCHARGE." When the case file has been assembled, the complaint processor will release the file in accordance with instructions received from the supervisory special investigator.

   b. Section 110: Section 110 case files will be established by the supervisory special investigator, which will consist of a file folder with a two-prong fastener. The Violation Review Form and all supporting information, or documentation from the District Manager authorizing initiation of an investigation, shall be inserted under the two-prong fastener. The Investigation Assignment Control Form 2000-158 (Exhibit 7-3) shall be stapled onto the left inside cover. Instructions for completion are outlined in Exhibit 7-4.

      Case files shall be sent by certified mail--return receipt requested or picked up by the special investigator assigned to the case.

      All special investigative files shall be stamped "CONFIDENTIAL" on the outside cover and must be kept under lock and key. The special investigator shall be responsible for maintaining the confidentiality and security of all files under his/her jurisdiction.

Access to these files shall only be on a need-to-know basis and a record of each access shall be recorded on the Investigation Assignment Control Form (Exhibit 7-3) located in the left side of the case file.

3. Investigation Assignment Control Form: All contacts, including telephone contacts, with any person involved in the investigation shall be noted on the Investigation Assignment Control Form in the case file. This chronology of events and reference may be used to resolve any later differences of opinion concerning events which transpired during investigation of the case.

4. Organization: The final report and all exhibits shall be placed into a file folder and "post-bound" by a two-prong fastener. If more than one folder is required, they shall be numbered sequentially. Each folder shall have a label indicating the case number and parties involved.

Example: HOPE-CD-89-01 or MD-89-01
Doe v. ABC Coal Company Doe v. XYZ Gravel

Each case file folder shall be organized in the following manner:

a. Left inside cover: The Investigation Assignment Control Form (Exhibit 7-3) shall be attached to the left inside cover. No other documents are to be placed on this side.

b. Right inside cover: The right side of the case file folder shall contain the cover sheet, final report, List of Exhibits, and all other documents properly tabbed as exhibits. These documents shall be attached to the folder by a two-prong fastener. The cover sheet, Final Report of Investigation and List of Exhibits shall be the top three items on the right side of the folder.

The following is a sample listing of exhibits which may be included in the file. Not all of these documents will be appropriate for every type of investigation, nor will they necessarily be included in this order.

(1) Discrimination Complaint Forms, if 105(c); or Possible Knowing/Willful Violation Review Form or documentation authorizing investigation, if 110;

(2) Interview statements;

(3) Legal Identity Report (include for all types of investigations);

(4) All evidence relative to the establishment of jurisdiction;

(5) A certified copy of the State records of the Articles of Incorporation, or Certificate of Doing Business, for the corporate operator in the State in which the violations may have occurred;

(6) Copies (certified, if appropriate) of all pertinent citations, orders, modifications, and terminations;

(7) Photographs, maps, and/or sketches of area(s) which indicate pertinent locations and/or points;

(8) Copies (certified, if appropriate) of mine plans such as ventilation, methane and roof control plans;

(9) MSHA accident reports relative to the investigation;

(10) Technical reports and/or laboratory analyses;

(11) Mine records such as preshift examination reports, etc.;

(12) Transcripts and/or records of Section 103(b) hearings, joint Federal/State hearings, and arbitrations;

(13) Names, addresses and telephone numbers of persons interviewed, or possible witnesses who may be called in any subsequent litigation or public hearing;

(14) Internal memoranda, form letters, or other relevant correspondence; and,

(15) Any other documents relevant to the special investigation.

5. **Exhibits**: Clear and readable copies of all statements and other documents referred to in the final report of investigation as exhibits shall be numbered and attached

to the final report. Each exhibit shall be tabbed on the first page and the tab appropriately marked with an exhibit number (e.g., Ex. 1). If the exhibit consists of more than one page, each page shall be numbered in the lower right-hand corner in ink, showing the exhibit number and page (e.g., 1-1, 1-2, 1-3).

6. Screening and Storage of Notes and Work Papers: When the investigation has been completed, all original work papers and notes used or generated by the special investigator during the course of the investigation must be inserted in a manila envelope and placed in the case file. If later called upon to testify, these notes and work papers may be used to refresh your memory. No personal memoranda or other extraneous notations not related to the case should be included among these work papers.

   The supervisory special investigator shall maintain the official file in the district office. The special investigator may retain an extra copy until a case has been litigated or closed, at which time it will be forwarded to the supervisory special investigator for disposal.

7. Number of Case Files: For each type of special investigation, the following number of case file folders must be prepared and submitted to the Headquarters special investigations office:

Metal/Nonmetal Mine Safety and Health

Type of Investigation	Number of Case Files
All special investigation case files recommending action	Original + 2 copies
All special investigation case files recommending no further action.	Original + 1 copy

Coal Mine Safety and Health

Type of Investigation	Number of Case Files
Section 105(c), discharge complaints	3 copies
Section 105(c), all other complaints	2 copies

Section 110, recommending prosecutorial action. (The original case file shall be retained by the investigator, or the custodian of evidence, so that the chain of custody may be more easily maintained.)	3 copies
Section 110, recommending assessment of individual civil penalty.	2 copies
Section 110, recommending no violation.	2 copies

8. Transmittal of Case Files: The special investigator shall forward the completed case file to the supervisory special investigator to review for completeness and conformance to the procedures set forth in this Handbook. The supervisory special investigator may return the file for correction or additional information. The appropriate number of files will then be transmitted to the appropriate Administrator, to the attention of the special investigations headquarters office through the District Manager. (See Exhibit 7-5 for Section 110 cases and Exhibit 7-6 for Section 105(c) cases.) All files shall be placed in heavy duty envelopes and sent by certified mail, return receipt requested. Transmittal envelopes shall be clearly marked "Special Investigation - Confidential."

   Completed Section 110 case files should be forwarded to the special investigations headquarters office within 180 days after the case number is assigned. If additional investigative time is required, an extension may be requested in writing from the special investigations headquarters office, through appropriate supervisory channels.

B. FINAL REPORTS - GENERAL

Every final report of investigation, regardless of the type, shall be prepared in the appropriate manner set forth below. When the final report and case file are being reviewed by the supervisory special investigator for completeness and adherence to policy, changes shall not be made without first consulting with the investigator who conducted the investigation and prepared the final report.

1. **Section 105(c) Final Report Format**:

a. Introduction: The purpose of the introductory statement is to quickly orient the reader with the subject matter of the investigation.

(1) The parties involved;

(a) The name, age, address, home telephone number, job title, and present work status of the complainant.

(b) Whether or not the complainant was a miner, representative of the miners, or an applicant for employment; if the complaint was timely filed and, if not, explain why.

(2) The incident involved and where it took place. Identify the specific protected activity that the complainant was engaged in at the time of the alleged discriminatory act. When a miner withdraws himself/herself, or refuses to work because he/she believes that a condition or practice is unsafe, indicate whether or not the complainant communicated his/her belief of the protected activity to mine management. If the complainant did not communicate this belief, indicate why not. Describe circumstances which would make a communication to management unnecessary.

Identify the specific discriminatory act that occurred as a result of the protected activity and outline the consequences. Be especially careful to identify any complaint that involves a claim of pretext or disparate treatment.

Such claims need to be carefully documented and require evidence regarding similarly situated individuals.

If the alleged discriminatory act has been a continuous event, identify the most recent incident and proceed backwards in chronological order. Indicate the complainant's remedy status, i.e., whether seeking immediate reinstatement or has gained other employment (current work status) or if the complainant seeks only monetary damages (backwages and interest).

b. Supporting Evidence and Witnesses for the Complainant: Identify and obtain originals or copies of any evidence related to the issue that supports the complainant's position and allegations. Identify, by name and occupation,

any witnesses who can testify on behalf of the complainant. This statement should indicate whether the witnesses can provide direct, circumstantial or hearsay evidence regarding the issue. Reference the exhibit and page number to support this statement.

Example: John Doe, Continuous-Mining Machine Operator, can testify that he was present and heard Bill Smith, Mine Foreman, order the complainant to install roof bolts without using temporary supports. When the complainant refused, the Mine Foreman told the complainant to get his bucket and leave the mine.

Indicate which witnesses refused to be interviewed and those which stated an unwillingness to testify.

c. Supporting Evidence and Witnesses for the Respondent: Identify and obtain originals or copies of any evidence related to the issue that supports the respondent's position and allegations.

Identify, by name and occupation, any witnesses who can testify on behalf of the respondent. This statement should indicate whether the witnesses can provide direct, circumstantial or hearsay evidence regarding the issue. Reference the exhibit and page number to support this statement. Identify which witnesses refused to be interviewed and those which stated an unwillingness to testify.

If appropriate, identify the attorney, firm, street address and telephone number of legal counsel representing the respondent.

d. Conclusion(s) and Recommendation: A short paragraph should be written that identifies each of the elements indicated above.

EXAMPLE: Evidence in the case file reveals that the complainant, John Doe, Roof-Bolter Operator, refused a direct order from the Mine Foreman, Bill Smith, to install roof bolts without using temporary supports. As a result of this refusal, the complainant was immediately discharged from employment. Based on the evidence obtained during this investigation, it is the conclusion of this investigator that a violation of Section 105(c) has (or has not) occurred.

2. Section 110 Final Report Format:

a. Introductory Statement: The purpose of this introduction is to quickly orient the reader to the subject matter of the investigation, the details of which are more fully discussed in the body of the report. The introduction should identify the parties; the size, type and location of the mine; the incident involved and when and where it took place. Indicate whether the mine is affiliated with a parent corporation, a subsidiary of a multi-national corporation, a family operation, or a single ownership.

b. Background and Jurisdiction Information: The following documents, background and jurisdictional information shall be obtained for all types of Section 110 reports. All statements of fact must be referenced to the appropriate exhibits and attached to the final report.

Legal Identity Report;

When the current operator commenced operating the mine;

Number of miners employed;

Whether the mine is union or nonunion and, if union, the identity of representatives of the miners;

Mining method used;

Daily production rate or quarterly manhours; and,

Anything else which would present a "picture" of the mine for the reader who is not familiar with mining.

Documents which establish jurisdiction under the Act;

The prior history of the mine operator, parent corporation (if any), and the operator of the subject mine, as well as background information on key witnesses (to the extent that this information is readily obtainable). The history of the parent corporation should include brief descriptions of the length of time it has been operating its mines; the length of time it has been operating the subject mine; its size in terms of number of mines, number of employees, and yearly production or manhours

as compared to other mines in the area (if known); and activities and interests of any affiliated, parent or subsidiary companies which may have a bearing on the case;

If a violation may have been committed by an operator, or any director, officer, or agent of a corporation, include the following information for the persons(s): names, addresses (business and home), telephone numbers, title and description of duties (especially if supervisory), length of time in their present job and preceding mining employment, State or Federal certification or other tests taken, safety training courses attended and any other information which establishes their knowledge of mine safety requirements; and,

A history of the mine's compliance record, i.e., previous and ongoing Sections 105(c) and 110 investigations and the dispositions thereof; prior violations; and Temporary Restraining Orders, injunctions, etc., and the dispositions thereof; and any other similar information.

c. Investigative Findings: All of the relative information gathered during the investigation shall be set forth in sequential narrative form. Attach copies of all documents (except for Section 110 reports when a chain of custody must be maintained) as exhibits to the final report and reference them when referred to in the body of the report. If the case involves an accident (as defined under Section 3[k] of the Act), a brief description, using photographs, maps, or sketches, shall be given, setting forth the details of any fatality and/or personal injury. Each item of material information and evidence concerning each violation should be attributed to its source (i.e., a specific statement of a witness, a particular mine record, etc.). In this regard, reference should be made to the appropriate page numbers of interview records and/or other documentary exhibits attached. In Section 110 reports, the location and chain of custody of all physical evidence shall be specified. It is most important to relate the statements of the witnesses and the evidence obtained to the respective violation so that it can be more easily determined which witnesses and items of evidence should be subpoenaed. Finally, if "expert" testimony may be necessary, specify the area of expertise required and the "expert" witness, if known.

The "Investigative Findings" portion of any final report is more than likely complete if the following were taken into consideration and addressed in the report:

Did the narrative statement review the relevant facts of each exhibit?

Were the exhibit numbers referenced after stating the material facts of the case?

Were all the facts from each exhibit mentioned that were relevant to the investigation?

Were the findings limited to the material facts and those facts excluded that were not immediately relevant to the investigation?

d. Summary of Relevant Facts: Summarize in chronological order the relevant facts, based on the available evidence (cite the exhibit and page number to support the findings) to support each alleged violation and who may have been responsible. When there is a conflict in the statement or evidence, point out the conflict.

e. Conclusions: The report should include the investigator's conclusion of whether or not he/she believes that a violation occurred and, if so, which individual(s) and/or corporation may be responsible and who or whom would be liable.

When stating a conclusion or recommendation regarding a possible violation of Section 110(c), the following must be addressed:

Was the operator a corporate operator?

Does the evidence support the corporate violation cited in the citation or order under investigation?

Was the individual who may be charged under Section 110(c) an agent, director or officer of the corporation, and, if so, which? If an agent, what were his/her responsibilities? Did the individual who may be charged under Section 110(c) knowingly authorize, order or carry out the violation cited in the citation or order under investigation and, if so, which theory of liability is recommended, i.e., did he/she knowingly authorize, knowingly order or knowingly carry out?

Were the conclusions or recommendations limited to the condition or practice in the citation or order under investigation?

SPECIAL INVESTIGATIONS - COAL

CASE NUMBER CODES FY - 89[1]

Case Numbers will be assigned using the following prefixes for identification.

HEADQUARTERS - HQ

DISTRICT 1 - WILK	DISTRICT 6 - PIKE
DISTRICT 2 - PITT	DISTRICT 7 - BARB
DISTRICT 3 - MORG	DISTRICT 8 - VINC
DISTRICT 4 - HOPE	DISTRICT 9 - DENV
DISTRICT 5 - NORT	DISTRICT 10 - MADI

Activities will be coded in the following manner (Example: The third discrimination complaint filed in District 6 would be PIKE-CD-89-3):

CODE		
CD-89-X	Coal - Discrimination Complaint	105(c)
CSI-89-X	Coal - Special Investigation	110(c), (d), (f) or (h)
CDE-89-X	Coal - Denial of Entry	108(a)
CAO-89-X	Coal - Working Against Orders	108(a)
CTI-89-X	Coal - Threats Against Inspectors	108(a)
CPI-89-X	Coal - Preliminary Inquiry	

MIS CODES

AGA - Preliminary Inquiries

AGB - Section 110 Investigations

AGC - Section 105(c) Investigations

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[1]FY 1989 is used as an example only. The last two digits of the appropriate fiscal year should be inserted in the case number.

Exhibit 7-2

SPECIAL INVESTIGATIONS

METAL AND NONMETAL

CASE NUMBERS AND CODES

Case numbers will be assigned using the following prefixes for identification:

NORTHEAST DISTRICT - 10

SOUTHEAST DISTRICT - 20

NORTHCENTRAL DISTRICT - 30

SOUTHCENTRAL DISTRICT - 40

ROCKYMOUNTAIN DISTRICT - 50

WESTERN DISTRICT - 60

Examples of how they would appear:

Prefix	Case Code	Year	Number	
10	MD	89	01	(Discrimination)
50	MW	89	01	(Section 110)
40	MWP	89	01	(Preliminary Inquiry)

The numbers will be given out in numerical sequence as they are requested.

MIS CODES

11	Section 110 Investigation
14	Section 105(c) Investigation
20	Preliminary Inquiry

Exhibit 7-3

Investigation Assignment Control

U. S. Department of Labor
Mine Safety and Health Administration

1 Case Number

2 Date Case Assigned

3 [illegible]

4 Mine Company

5 Mine Name

6 ID Number

7 Address

8 Type of Discrimination

Discrimination Complaints Only (Items 9 – 13)

9 Complainant's Name

10 Phone Number

11 Address

12 Respondent's Name(s)

13 Date Complaint Received

15 Doc. Start Date

30 Doc. Delivery Date

14 Approval

15 Prior Mine/Supervisor's Approval Event Number

16 Attorney Assigned

17 Date

18 Disposition

19 Final Action

Case Diary

Date	Action	Page

MSHA Form 2000-138, Oct 88 (Revised) Case Diary Sheet Cec. D

Exhibit 7-4

INVESTIGATION ASSIGNMENT CONTROL FORM

General Instructions for Completion

The purpose of the Investigation Assignment Control Form is to summarize pertinent case data, provide a chronological record of investigative activities, and track the amount of time the investigator spends on the investigation. The form is a permanent part of the case file.

The complaint processor, or other individual, initiating the case file folder, will complete Items 1 through 13 and 19 for discrimination investigations. The investigator assigned to the case will complete the "Case Diary" section as the investigation progresses. The original copy will be stapled to the left inside cover of the case file; the other copies will be distributed as indicated on the bottom of the form.

Listed below is an explanation of the information needed under each item number:

1. Case Number: The number assigned to the special investigation: for M/NM by Arlington Headquarters; for CMS&H by the supervisory special investigator.

2. Date Case Assigned: The date the case number was assigned to the investigator.

3. Investigator: The name of the individual who will conduct the investigation.

4. Mine Company: The name of the principle mine company involved in the investigation.

5. Mine Name: The name of the principle mine involved in the investigation.

6. I.D. Number: I.D. Number of mine.

7. Address: The complete address of the mine operator.

8. Type of Discrimination: Discharge; Interference; or Applicant for Employment.

(Complete Items 9 through 19 for discrimination complaints only):

9. Complainant's Name: The name of the person filing the complaint. If more than one person is filing, you may put the name of the first person and then "et al".

10. Phone: A telephone number where the person filing the complaint can be reached.

11. Address: The home address of the person filing the complaint.

12. Respondent's Name(s): The name(s) of the individual(s) who allegedly took discriminatory action against the miner. If more than one respondent is named, you may put the name of the first, followed by "et al".

13. Date Complaint Received: The month, day and year the person filed the complaint; or the month, day and year the letter or written document alleging a discriminatory action was received in any MSHA or ESA Black Lung office.

    15-Day Start Date: The date by which the investigation shall be commenced (15 calendar days after the date the complaint was received).

    90-Day Decision Date: The date by which a determination must be made as to whether or not a violation occurred (90 calendar days after the date the complaint was received).

14. Referrals: The date and office/person to whom the case file was sent.

    Example: On 12/10/88, the complaint processor sent the case file to John Doe, Special Investigator.

Referrals

12/10/88 John Doe, Special Investigator
12/31/88 Bill Smith, Senior Special Investigator
01/05/89 Special Investigations, Arlington

15. Prior History/Supervisor's Remarks/Event Number: The senior special investigator will indicate other complaints filed by the miner or against the respondent, previous violations which were under investigation, or

other background information which would aid the current investigation. Also, include the Event Number in this item.

16. Attorney Assigned: The name of the headquarters or regional attorney assigned to the case.

17. Date: The date the attorney was assigned to the case.

18. Disposition: The special investigation headquarters office will indicate the final results of the case, i.e., "violation, penalty assessed", "case dismissed", etc.

19. Field Office: The location of the field office and the district where the complaint is filed.

    Example: Harlan, Kentucky, District 7

    Case Diary: A chronological listing of all the actions the special investigator takes during the course of any investigation:

    Date: The date the action occurred.

    Action: The particular activity performed, i.e., "interviewed William Jones".

    Place: Where the particular activity was performed.

    Hours: Time spent on the activity.

    Initials: Initials of person performing the activity.

Exhibit 7-5

MEMORANDUM FOR ADMINISTRATOR
(for Coal Mine Safety and Health)
(for Metal/Nonmetal Mine Safety and Health)

FROM: District Manager

SUBJECT: Transmittal of Report of Special Investigation Case Number _____

Attached is the subject report of a special investigation. A review of the information gathered during the investigation indicates that a possible violation of Section 110 has (or has not) occurred.

If you have any questions, please contact the supervisory special investigator indicated in the report.

Enclosures (include appropriate number of case files)

MEMORANDUM FOR ADMINISTRATOR
(for Coal Mine Safety and Health)
(for Metal/Nonmetal Mine Safety and Health)

FROM: District Manager

SUBJECT: Transmittal of Report of Discrimination Investigation Case Number _____

Attached is the subject report of a discrimination investigation. A review of the information gathered during the investigation indicates that a possible violation of Section 105(c) has (or has not) occurred.

If you have any questions, please contact the supervisory special investigator indicated in the report.

Enclosures (include appropriate number of case files)

CHAPTER VIII - COURT PROCEDURES

A. INTRODUCTION

The trial of a case, whether before a U.S. District Court Judge or U.S. Magistrate, or before an Administrative Law Judge of the Federal Mine Safety and Health Review Commission, is a crucial step in the enforcement process. In order to ensure success at trial, careful preparation of the case is necessary, with complete cooperation between the Government attorney and the special investigator.

In all civil cases, an attorney from the Office of the Solicitor will present the Agency's case. In criminal matters, an attorney from the Department of Justice will present the Agency's case, with assistance from an Office of the Solicitor attorney.

Special investigators should become thoroughly familiar with the information in this Chapter to enable them to understand the relationship of case preparation, presentation of evidence, and the decision of a court. Although this Chapter is oriented to criminal proceedings, the fundamental order of presentation and testimony of witnesses is the same in all trials. The variation in rules of procedure and decision-making (judge instead of jury) are not critical for special investigators and can be explained, as necessary, by the attorney in charge of trying the case.

B. PLANNING FOR THE TRIAL

Before prosecutorial action under Section 110(d) of the Act may be taken, the case may be presented to a grand jury by the U.S. Attorney and an indictment returned, or an information may be filed by the U.S. Attorney. Prior to the presentation of the case before a grand jury, the investigator may be requested by the U.S. Attorney to review the case, evaluate its merits, weaknesses and particular problems. The investigator may assist in the preparation of the indictment form and may testify at length before the grand jury concerning the investigation.

The investigator will frequently be asked to aid in the preparation of a trial brief or trial book. If asked, a sheet should be prepared (a copy for the U.S. Attorney and for each person who will assist in the trial) on each witness, showing the name and address; business or occupation; expected testimony; a description of the documents, if any, which the witness will produce or identify; location of the records or documents, if not in the custody of the witness; and data of a derogatory nature (criminal record, etc.), which would be pertinent to the witness' reliability or credibility. Because of the Jencks Act (Section 3500, Title 18, U.S. Code), it is also advisable to list any

documents such as signed statements, affidavits, or reports of interview obtained from the witness or prepared by the investigator. The witness sheets may be placed in a looseleaf notebook in the order in which the witnesses are expected to testify. If many witnesses are involved, it is helpful, for reference purposes, to assign each a number and prepare a list of witnesses arranged and numbered in the same order as the witness sheets. All of the above, however, will be subject to the discretion of the U.S. Attorney and, in all instances, whatever is asked should be provided exactly as requested. Do not be reticent when discussing the case with the U.S. Attorney; it is better to tell him/her too much than to assume that something is not important. The attorney will want to know all of the facts, not just what the investigator considers important.

The investigator should study his/her notes and reports to refresh his/her memory concerning the general phases of the investigation and conferences with the witnesses. Arrange the notes, reports, work papers, etc., in an order which will provide for quick reference when testifying at the trial. Copies of all statements and reports that have any bearing on the investigator's testimony should be available for presentation to the court, if such data is requested by the defense under Title 18 U.S.C. 3500.

The U.S. Attorney may also request the investigator's assistance in providing information on the Government's response to various pretrial motions such as motions to suppress evidence, for a bill of particulars, for discovery and inspection, etc. The U.S. Attorney may also request legal assistance from the Office of the Solicitor which may require the investigator to discuss the case or provide relevant information to the Solicitor's attorney handling the matter. The investigator's full cooperation must be given to the Solicitor's attorney, as well as to the U.S. Attorney.

C. THE TRIAL

1. Evidence (Rule 26): In all trials, the testimony of witnesses is taken orally in open court unless otherwise provided by law or these rules. Also, with certain exceptions which are covered by law or these rules, the admissibility of evidence and the competency and privileges of witnesses are governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

2. Sequestering of Witnesses:

   a. Some courts, on their own motion or on request of either counsel, will bar from the courtroom all

witnesses except the one on the stand. This involves: (1) preventing the prospective witnesses from discussing the case with each other; (2) preventing them from hearing a testifying witness; and, (3) preventing them from discussing the case with a witness who has left the stand. If the order of exclusion is knowingly disobeyed, the court may, in its discretion, disqualify the witness or take other disciplinary measures.

b. If this rule is invoked, the court may, at the request of the U.S. Attorney, make an exception permitting necessary MSHA representatives to remain in the courtroom to assist in the trial.

3. Presentation of the Case: The Government goes first in presenting proof of the offenses charged. It does this by questioning witnesses and introducing documentary evidence. Upon conclusion of the direct-examination of each witness by the U.S. Attorney, the witness is turned over to the defense counsel for cross-examination, if desired. After cross-examination, the Government has the opportunity for redirect-examination as to matters brought out in the cross-examination. This may continue until the Judge rules otherwise. Upon the conclusion of the Government's case, the prosecution rests, and the defendant may then go forward with the evidence. The prosecution may cross-examine defense witnesses and, after the defendant rests, may offer proof in rebuttal.

4. Cross-Examination: When the attorney has finished examining the witness, the opposing attorney has the right to cross-examination. The purpose of cross-examination is to test the truth of the statements made by the witness. This is done by questions designed to: (1) amplify the story given on direct-examination so as to place the facts in a different light; (2) establish additional facts in the cross-examining party's favor; (3) discredit the witness' testimony by showing that the testimony on direct-examination was contrary to circumstances, probabilities, and other evidence in the case; and, (4) discredit the witness by showing bias, interest, corruption or specific acts of misconduct. In view of such purposes, the courts allow a wide latitude on cross-examination, and the cross-examiner may ask leading questions. Another method often used is to question the witness in such a manner as to obtain apparent inconsistent statements by going over the same ground covered in the direct-examination.

The general rule in Federal courts with respect to witnesses other than defendants is that questions asked

on cross-examination must pertain to matters brought out on direct-examination. The rule is liberally construed and, where the direct-examination opens a general subject, the cross-examiner may go into any phase of that subject. If the cross-examiner wishes to obtain from the witness evidence on subjects not opened on direct-examination, the cross-examiner must call the witness as his/her own witness and subject the witness to direct examination on such matters.

The U.S. Attorney will make any necessary objections. If there is no objection, answer the question.

5. Rebuttal: After the defense rests, the prosecution may offer proof in rebuttal to explain, counteract, or disprove the defendant's evidence. For example, after a defendant testified that he made substantial payments to a deceased supplier for services rendered, the Government may put into evidence the supplier's records which did not include any such amount, in order to discredit the defendant's testimony.

D. RESPONSIBILITY AND CONDUCT OF THE INVESTIGATOR

During the trial, the investigator may or may not be present at the counsel table with the U.S. Attorney. The special investigator must listen and heed the advice and instruction of the U.S. Attorney. This may include maintaining all Government exhibits in proper order for ready reference and presentation; keeping a list of both Government and defense exhibits as they are introduced; and checking to ensure that Government witnesses are present and ready to testify.

The investigator should listen carefully to all testimony and, if asked, make notes from which he/she may alert the U.S. Attorney at the appropriate time (do not interrupt) as to any false, misleading or erroneous statement. The special investigator may also assist in preparing questions to be asked defense witnesses on cross-examination.

The investigator should avoid any direct contact with the defendant at the trial in order to eliminate the possibility of any embarrassing or compromising situations that could arise. Likewise, his/her association with defense counsel should be only in open court and with the knowledge and consent of the U.S. Attorney.

The court will usually instruct the jury against any contact with the attorneys or witnesses in the case. Any attempts by the investigator to associate with a member or members of the jury may cause a mistrial.

E. TESTIFYING

Testifying in court is one of the most important duties that an investigator may be called upon to perform. The testimony will usually be vital in establishing civil or criminal violations. The testimony may concern examination of the subject's books or records and the extent to which they were examined, the procedures followed and the facts discovered.

As a witness, the investigator must be thoroughly prepared and have clear, orderly facts; present a neat, professional appearance; testify in a natural, frank and forthright manner; and have a respectful attitude toward the court and jury. The investigator is frequently subject to rigorous and lengthy cross-examination and must preserve an even, courteous manner and refrain from any display of anger, hostility, or evasiveness. Some rules of conduct for the investigator, or any other person on the witness stand, are listed below:

Listen to the question carefully and answer truthfully. If you do not know the answer, say so--do not guess; remember, you are under oath.

Answer the question fully, but do not volunteer information. It may seriously affect the U.S. Attorney's strategy.

Do not answer a question you do not understand. Tell the questioner that you do not understand.

If an objection to a question is raised by either counsel, wait to answer until the court rules. Otherwise, a mistrial may result.

Wait until the question is completed before attempting to answer.

Anticipate the unexpected.

Direct your answers to the jury, but do not ignore the judge.

Speak clearly and loudly enough to be heard by the juror farthest removed from the witness stand.

Refrain from any demonstration of personal feeling or bias.

Do not use idioms or language peculiar to the industry - unless necessary.

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